

# Judicial Abstinence: Ninth Circuit Jurisdictional Celibacy for Claims Brought Under the Federal Declaratory Judgment Act

*Steven Plitt & Joshua D. Rogers\**

The time honored axiom of the common law tradition is that a court must exercise the jurisdiction that it possesses.<sup>1</sup> Chief Justice Marshall declared that judicial conduct contrary to this principle would be in direct defiance of the prerogatives set forth in the Constitution. Marshall opined, “[we] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be *treason* to the constitution.”<sup>2</sup>

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\* Steven Plitt is an Adjunct Professor of Law teaching the insurance law curriculum at Arizona State University College of Law. Mr. Plitt is a Senior Share Holder with the Phoenix coverage boutique law firm of Bess Kunz where he maintains a multi-state complex insurance coverage practice. He is the new author for *Couch on Insurance Third* and has frequently published and lectured on complex insurance coverage and bad faith matters.

Joshua D. Rogers is an Associate with the law firm of Bess Kunz. He focuses his practice upon the litigation of complex insurance coverage cases. Mr. Rogers is an associate author for *Couch on Insurance Third*.

1. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496–97 (1971) *citing* *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). See also *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) (stating that “the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.”) (citations omitted); *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909) (observing that “[w]hen a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.”) (citations omitted). *McLellan v. Carland*, 217 U.S. 268, 282 (1910) (concluding that federal courts have “not authority” to abdicate jurisdiction because of pending state proceeding).

2. *Cohens*, 19 U.S. at 404 (emphasis added). Chief Justice Marshall, writing for the Court, observed:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot

"Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds."<sup>3</sup>

At the core of this belief is that where federal jurisdictional requirements have been legally met, an exercise of judicial discretion to abstain constitutes a judicial usurpation of legislative power. One leading commentator has articulated the view that abstention is anathema to the doctrine of separation of powers:

If Congress intended that the federal courts exercise a particular jurisdiction, either to achieve substantive legislative ends or to provide a constitutionally-contemplated jurisdictional advantage, a court may not, absent constitutional objections, repeal those jurisdictional grants. Though one may question why, if the courts do not possess the institutional authority to repeal the legislature's jurisdictional scheme, they possess any greater authority to modify the scheme in a manner not contemplated by the legislative body. In either repealing or modifying the legislation, the court would be altering a legislative scheme because of disagreement with the social policy choices that the scheme manifests. Thus, if a judge-made form of partial abstention is inconsistent with Congressional intent to leave federal court jurisdiction unlimited, the fact that the abstention leaves in tact a portion of the jurisdictional grant will not insulate it from a separation of powers attack.

The foundation of the separation of powers critique is the assumption that judge-made partial abstention conflicts with

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avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

*Id.* Justice Marshall's comments have found resonance with the court. See, e.g., Justice Brennan's warning in *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 15 (1983) where he stated that the Federal Courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." This belief has been expressed through leading scholarly publications. See, e.g., Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 112 (1984) (" . . . vesting a power in the federal courts to adjudicate the relevant claims without a corresponding duty to do so is unacceptable."). See generally David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Michael M. Wilson, Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 UNIV. CHI. L. REV. 641, 641-42 (1977) (observing that the right to a federal forum is secured by the Constitution); Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978, 980 (1950) (same); Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684, 687 (1960) (the right to a federal forum is secured by the Constitution and supportive judicial precedent). Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989); Linda S. Mullenix, *A Branch Too Far, Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986).

3. *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) citing *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922).

congressional goals embodied in the seemingly unlimited grants of jurisdiction. It is the validity of this assumption that arguably separates the total and partial abstention models as departures from separation of powers principles. Various models of implied congressional authorization may be employed to justified partial abstention, but they are incapable of supporting total abstention. While it is at least conceivable that Congress would implicitly delegate to the judiciary the authority to modify or limit a substantive statutory right or a jurisdictional grant, it is absurd to imagine that Congress would implicitly grant the courts authority effectively to repeal such legislation. The exercise of such authority would render pointless the entire legislative process.

The fact that Congress theoretically could delegate to the court the power to modify otherwise unlimited legislation, however, does not mean that Congress has actually done so. It is this improper leap from theoretical possibilities to assumed fact that ultimately undermines any defense of the partial abstention model from a separation-of-powers attack.<sup>4</sup>

The interrelationship between legislative mandates establishing the jurisdictional boundaries of the courts and court invocation of that jurisdiction is significant. Democratic societies rely upon majoritarian self-determination. "American Constitutional democracy vests in a largely unrepresentative judiciary the power to invalidate laws adopted by a majoritarian legislature when those laws are deemed to violate constitutional protections."<sup>5</sup> For American Constitutional democracy to function properly, the courts must act within their congressionally-conferred jurisdictional province.<sup>6</sup> However, invocation of jurisdiction

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4. Redish, *supra* note 2, at 77–79. Some commentators have argued for the expansion of federal judicial power for two principle reasons: (1) fear of perceived local prejudices, and (2) fear that a local forum will ignore or disregard federal law. David J. McCarthy, Note, *Preclusion Concerns as an Additional Factor When Staying a Federal Suit in Deference to a Concurrent State Proceeding*, 53 FORDHAM L. REV. 1183, 1198 (1985). See also Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WILLIAM & MARY L. REV. 605, 607 (1981) (federal courts are the preferred forum for determination and analysis of constitutional principles); David A. Sonenshin, *Abstention: The Crooked Course of Colorado River*, 59 TULANE L. REV. 651 (1985) (because federal judges have life tenure, they are less subject to the vagaries and pressures of local public opinion, Congress has preserved the federal forum to litigants.).

5. Redish, *supra* note 2, at 77.

6. In *TVA v. Hill*, 437 U.S. 153 (1978) the court observed:

Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," . . . it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its

by the federal courts has proved to be an elastic practice that has expanded and contracted with little jurisprudential consistency. This elasticity has been permitted by another axiom of the common law tradition, "abstention." While one axiom stands for the proposition that jurisdiction should be always be exercised, the other declares that there are circumstances where the former proposition does not hold up.<sup>7</sup>

Procedurally, federal courts can indirectly abstain from exercising jurisdiction without reliance on the abstention doctrine. This can be accomplished under the concept of justiciability,<sup>8</sup> or through the doctrines of ripeness,<sup>9</sup> *forum non conveniens*,<sup>10</sup> or exhaustion of remedies.<sup>11</sup> Even the United States Supreme Court has

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delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

*Id.* at 194 (quoting *Marbury v. Madison*, 5 U.S. 1 (Cranch) 137, 177 (1803). See also *California v. Sierra Club*, 451 U.S. 287, 298 (1981) and *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979).

7. *New Orleans Public Service*, 491 U.S. at 359 (1989) (stating that the axiom of exercising conferred jurisdiction "does not eliminate, however, and the categorical assertions based upon it do not call into question, the federal courts' discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted."). See also *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 422 (1932) (observing that "the proposition that a court having jurisdiction must exercise it, is not universally true.").

8. Under the concept of justiciability the court can indirectly abstain. The doctrine of standing and the doctrine of mootness may ultimately determine whether the federal court will abstain. The Supreme Court has recognized that the doctrine of standing has both a constitutional and a prudential aspect. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498–500 (1975) (court addressed the prudential limitations that were "closely related to Article III concerns but essentially matters of judicial self governance"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (recognizing the prudential limitation that a "litigant must normally assert his own legal interest rather than those of third parties"); *Craig v. Boren*, 429 U.S. 190, 193–94 (1996) (recognizing prudential objectives served by *jus tertii* limitations on standing).

9. The doctrine of ripeness has a large discretionary element associated with it. Compare *Poe v. Ullman*, 367 U.S. 497 (1961) with *Epperson v. Arkansas*, 393 U.S. 97 (1968) and it is not easy to discern whether a particular result rests upon the court's view of constitutional necessity or on prudential choice. See, e.g., *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89–90 (1947) (challenges to the Hatch Act unright with the intimation that the result was constitutionally mandated). Mootness is a deliberately open ended concept of justiciability where, as an example, in an action for equitable relief the reasonable expectation of repetition cannot render the matter moot despite a defendant's voluntary discontinuance of a challenged practice. See, e.g., *United States v. W. T. Grant Co.*, 345 U.S. 629, 632–36 (1953).

10. Another aspect of indirect abstention comes in the form of *forum non conveniens*. As an example, Justice Jackson in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) noted that "the principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."

11. Abstention may take the form of an implicit exhaustion of remedies. The plaintiff may be required to exhaust alternative routes of relief before seeking a federal forum. As an example, "[a] refusal to enjoin a state criminal proceeding is, in effect, a holding that a federal court will



discretion to indirectly abstain from the exercise of its jurisdiction.<sup>12</sup> However, the judicially created "abstention doctrine," in its various forms, has given even wider berth to the federal courts through which they may abstain from exercising their jurisdiction.

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consider the federal claim only on direct review or on habeas corpus, after the state proceeding has come to an end. Pullman abstention represents a "decision that a federal court will not consider the constitutionality of a state statute until the plaintiff has sought a clarification of state law . . . from a state court." Shapiro, *supra* note 2, at 558. For example, in *Ex Parte Royal*, 117 U.S. 241 (1886), a prisoner, about ready to be tried in a state court, sought federal habeas corpus relief on the ground that the state statute was unconstitutional. *Id.* at 245. In the opinion, Justice Harlan, observed that the federal court had jurisdiction over the case and that in special circumstances it might be appropriate for a court to grant relief before the conclusion of the state proceedings. *Id.* at 245-50. However, the court held that the state court should typically be permitted to proceed without federal interference so long as the state court was competent to consider the federal claim involved. *Id.* at 251.

12. The U.S. Supreme Court's appellate jurisdiction contains significant elements of discretion. See, e.g., Richard F. Wolfson, *Extraordinary Writs In The Supreme Courts Since Ex Parte Peru*, 51 COLUM. L. REV. 977, 991 (1951). The Court has obvious discretion regarding certiorari jurisdiction which has been made discretionary by specific legislative delegation. See 28 U.S.C. §§ 1254(1), 1257(3) (1982). This discretion is limited by self-imposed guidelines which the court chooses to impose upon itself. Commentators have discussed the formulation of potential criteria for the exercise of this jurisdiction. See, e.g., Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Imperial Study*, 59 N.Y.U. L. REV. 681 (1984) (attempting to formulate such criteria). See generally, Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1229-44 (1979). Although appellate jurisdiction over state court decisions raising federal questions is generally considered "obligatory" the determination of the substantiality of the particular federal question presented acts as a judicial prerequisite. If the question is not sufficiently substantial to warrant either plenary review or a summary determination on the merits the appeal may be dismissed. Commentators have observed:

Plainly, the criterion of substantiality is neither rigid nor narrow. The play of discretion is inevitable . . . . To the extent that there are reasonable differences of opinion as to the solidity of a question presented for decision [the administration of the rule for appeals] operates to subject the obligatory jurisdiction of the court to discretionary considerations not unlike those governing certiorari.

Felix Frankfurter & James M. Landis, *The Business Of The Supreme Court At October Term*, 1929, 44 HARV. L. REV. 1, 12-13 (1930). Professor Bickle in his essays on the federal judiciary delineated the clear distinction between the functions of the Supreme Court and of the lower federal courts. It was his position that the lower courts, being the primary agencies for the settlement of disputes, are bound by the axiom set forth by Marshall. In other words, they must "resolve all controversies within their jurisdiction, because the alternative is chaos." See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 173 (1962). See also Shapiro, *supra* note 2, at 577.

Another area of jurisdictional discretion for the U.S. Supreme Court revolves around its statutory authority to consider, upon certification by a Federal Court of Appeals, "any question of law in any civil or criminal case as to which instructions are desired." 28 U.S.C. § 1254(2) (1982). The Court has assumed the power to refuse to answer a certified question notwithstanding the fact that the statute does not explicitly advise the Court's authority is discretionary. See, e.g., *NLRB v. White Swan Co.*, 313 U.S. 23, 27 (1941) (dismissing the question certified as "hypothetical and abstract"). If a question is not thought to be worthy of the Court's time, the Court will not answer the certified question. See, e.g., *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (*per curiam*).

Originally, the doctrine of abstention was relegated to only those cases which arose in equity.<sup>13</sup> The doctrine has since expanded beyond equity application so that abstention is now applied to "all cases in which a federal court is asked to provide some form of discretionary relief."<sup>14</sup> Certainly, most federal judges in the present day would not consider the exercise of any of the various forms of abstention as an act of "treason." Instead, for many, using the guise of preserving federalism, this is simply a means of reducing part of the burden of the federal docket. The debate has long been raging over the elimination of areas of the federal courts' jurisdiction, with specific emphasis on diversity jurisdiction in general; however, because Congress has failed to address these issues, the courts have felt compelled to exercise judicial power to accomplish what Congress would not.<sup>15</sup>

The practical question that is of primary importance is just how far the federal courts are going to stray from the axiom of exercising jurisdiction in order to accomplish the goal of lightening their load. Further, it must be determined whether the courts are acting consistent with their Constitutional authority in their use of the abstention doctrine or whether it has simply become a matter of the ends justifying the means.<sup>16</sup>

This article focuses upon abstention in the context of the Federal Declaratory Judgment Act ("FDJA").<sup>17</sup> Congress enacted the FDJA in 1934, thereby authorizing federal courts to grant federal declaratory judgment relief.<sup>18</sup> The FDJA provides in relevant part:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate

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13. *Quackenbush*, 517 U.S. at 717. The *Quackenbush* court stated that "it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it 'is asked to employ its historic powers as a court of equity.'" *Id.* (quoting *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 120 (1981) (Brennan, J., concurring)).

14. *Quackenbush*, 517 U.S. at 730 (citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297 (1943); *Samuels v. Mackell*, 401 U.S. 66, 69-70, 72-73 (1971)).

15. Redish, *supra* note 2, at 112-15.

16. One commentator has observed:

Presumably no one would deny that a federal court cannot legitimately invalidate a federal statute solely because of its unwise policies, or because it would make judges work harder than they believe they should, or because the judges themselves would not have enacted such legislation. Such behavior by the judiciary would amount to blatant—and indefensible—usurpation of legislative authority. At most, the judiciary possesses authority to overturn federal legislation because it is unconstitutional, not because the judiciary considers it unwise. Yet, in a sense, the abstention doctrines amount to such usurpation.

Redish, *supra* note 2, at 72 (citations omitted).

17. 28 U.S.C. § 2201(a) (1994).

18. *See id.*

pleading, may declare the rights and other legal relations of any interested party seeking declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.<sup>19</sup>

Federal jurisdiction under the FDJA is based solely upon the original jurisdiction of the court; namely, diversity jurisdiction or federal question jurisdiction.<sup>20</sup> While district courts have discretion to exercise jurisdiction over declaratory judgment actions brought under the FDJA, that discretion is not unfettered.<sup>21</sup> A district court cannot decline to entertain a declaratory judgment action as a matter of whim or personal disinclination.<sup>22</sup> The discretion granted by the FDJA essentially builds the abstention doctrine into the grant of jurisdiction.<sup>23</sup>

In a recent Ninth Circuit decision, *Huth v. Hartford Insurance Company of the Midwest*,<sup>24</sup> the court greatly expanded the abstention doctrine within the Ninth Circuit, both in relation to the FDJA and to declaratory judgment actions generally. Under this expanded application, courts can free the federal docket of declaratory judgment actions with unfettered discretion, in contravention to federal precedent and the historical purpose of the abstention doctrine. The question is whether the other circuit courts, experiencing similar compressions within their dockets, will follow.

Part I will discuss the various forms of abstention and the historical progression and development of the abstention doctrine in federal case law, setting the background for the expansive holding in *Huth v. Hartford Insurance Company of the Midwest*. Part II of the article will discuss the procedural history of *Huth* and the respective rulings of the district court and the Ninth Circuit Court of Appeals as it relates to their application of the abstention doctrine. Part III will then analyze the numerous, and potentially detrimental, chilling effects of this ruling and the extensive broadening of the abstention doctrine as it applies to declaratory judgment actions, a development that diverges from the bases and reasoning of the doctrine as it has

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19. *Id.*

20. *Id.*

21. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995) ("Brillhart makes clear that District Courts possess discretion in determining whether and when to entertain an action under the [Federal] Declaratory Judgment Act").

22. *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (citing *Public Affairs Associates v. Rickover*, 369 U.S. 111, 112 (1962)).

23. *See Wilton*, 515 U.S. at 282.

24. 298 F.3d 800 (9th Cir. 2002).

been historically applied. Part IV will conclude the article, summarizing the federal courts' use of this doctrine and how the *Huth* decision is the next extensive progression in the unilateral narrowing of the boundaries of jurisdiction undertaken by the federal judiciary.

# I. THE ABSTENTION DOCTRINE IN FEDERAL JURISPRUDENCE— AN HISTORICAL OVERVIEW

While the original power to abstain from exercising federal jurisdiction arose out of the historical discretion of federal courts sitting in equity,<sup>25</sup> the doctrine remained largely undeveloped in the United States until the early 1940s.<sup>26</sup> The main purpose of the abstention doctrine is to maintain a balance between state and federal sovereignty, but commentators disagree on the proper scope of its use.<sup>27</sup> Supporters of abstention argue that abstention promotes a wiser balance of judicial federalism.<sup>28</sup> In contrast, some critics seek to show the superiority of federal courts over state courts as enforcers of federal rights.<sup>29</sup>

25. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (observing that "it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it 'is asked to employ its historic powers as a court of equity.'" (quoting *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 120 (1981) (Brennan, J., concurring))).

26. Redish, *supra* note 2, at 71 (stating that "[t]he federal courts have long assumed the authority to decline to exercise jurisdiction explicitly vested in them by Congress. The courts have also assumed that they may decline to enforce certain substantive federal rights, usually those protecting individual civil liberties against state invasion. These presumptions of authority are manifested in the various 'abstention' doctrines, developed by the federal courts largely within the last fifty years.") (citations omitted).

27. For a brief comparison of abstention doctrine see Charles Alan Wright, et al., *Federal Practice and Procedure*, § 4241 (2d ed. 1988). In justifying federal abstention, the Supreme Court has expressed concern for comity and federalism interests. The relationships between coordinate state and federal judicial systems is often referred to as "comity." The relationships between state and federal sovereigns is often referred to as federalism.

28. See, e.g., Randall P. Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107, 1151 (1974) (abstention is the "highest form of cooperative judicial federalism"); Shapiro, *supra* note 2, at 581 (observing that "even in a system that is essentially unitary in character, experience counsels mutual respect among the arms of government").

29. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1131 (1977) ("the only judicial forums in our system capable of enforcing counter majoritarian checks in a sustained, effective manner are the federal courts."). It has been argued:

[T]he courts are functionally better adapted to engage in the necessary fine tuning than is the legislature. Moreover, questions of jurisdiction are of special concern to the courts because they intimately affect the courts' relations with each other as well as with the other branches of government. Therefore, the continued existence of measured authority to decline jurisdiction does not endanger, but rather protects, the principle of separation of powers.

Shapiro, *supra* note 2, at 574. However, this commentator also noted that "a wholesale refusal by the federal courts to adjudicate diversity cases on the grounds that these courts have more important things to do, and that the state courts are more appropriate tribunals, simply cannot be

While the many variations on the abstention theme<sup>30</sup> overlap to differing degrees, there are several well-known and established classes or categories of abstention.<sup>31</sup> The principle variants are: *Pullman*,<sup>32</sup> *Burford*,<sup>33</sup> and *Younger*<sup>34</sup> abstention. These types of abstention "are not rigid pigeon holes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes."<sup>35</sup>

#### A. Pullman Abstention—Allowing Resolution of Unsettled State Law Questions

*Pullman* abstention,<sup>36</sup> arising out of the Supreme Court's decision in *Railroad Commission of Texas v. Pullman Company*,<sup>37</sup> applies to cases presenting federal constitutional issues that have become moot or may

reconciled with the congressional grant of authority, no matter how much appeal this approach may have for particular judges." *Id.* at 587 (citing *Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336 (1976) (holding that a district court may not remand a case removed from state court on diversity grounds when the sole reason for remanding was the district court's crowded docket)).

For an argument to reorient the abstention doctrines see James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STANFORD L. REV. 1049 (1994).

30. Many concepts can be labeled as part of the abstention doctrine. A case in point is exemplified by so-called *Rooker-Feldman* abstention which originated from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Under *Rooker-Feldman* abstention, the court recognizes that Congress has conferred original jurisdiction and not appellate jurisdiction on the federal district courts. *Rooker-Feldman* abstention prevents a state court party from having two bites at the apple: one through the state courts with a petition to the U.S. Supreme Court and the other through a subsequent collateral attack originating in the federal courts. Where a party begins litigating a constitutional matter in state court and stops short of petitioning the U.S. Supreme Court, and then initiates litigation in federal court regarding the same constitutional matter, the federal district court can abstain. *Rooker-Feldman* abstention essentially holds that the federal district court does not have appellate jurisdiction over the state court. The state court party should continue through the state court proceeding up through the U.S. Supreme Court.

31. See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987).

32. See *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

33. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

34. See *Younger v. Harris*, 401 U.S. 37 (1971).

35. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987).

36. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75–76 (1997); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 230 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 9 (1983); *Moore v. Sims*, 442 U.S. 415, 427–28 (1979); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477 (1977); *Harris County Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975). Cf. *Grove v. Emison*, 507 U.S. 25, 32 n.1 (1993) (stating that while the *Pullman* doctrine is referred to as a form of abstention, "[t]o bring out more clearly, however, the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits, it would be preferable to speak of *Pullman* 'deferral.' *Pullman* deferral recognizes that federal courts should not prematurely resolve the constitutionality of a state statute . . .").

37. 312 U.S. 496 (1941).

be presented in a different posture as the result of a state court determination of relevant state law involved in the case.<sup>38</sup> In other words, "when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question."<sup>39</sup>

The Court's decision in *Pullman*, and the resultant doctrine of *Pullman* abstention, is a reflection of constitutional avoidance, a doctrinal goal traditionally embraced by the Supreme Court.<sup>40</sup> To this end, *Pullman* abstention attempts to avoid "'needless friction' between federal pronouncements and state policies" and promotes the general preservation of federalism.<sup>41</sup>

The exercise of *Pullman* abstention requires the presence of two conjunctive<sup>42</sup> elements or "special circumstances."<sup>43</sup> First, there must be an uncertain question of state law.<sup>44</sup> Second, the unsettled question

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38. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959)).

39. *Orr v. Orr*, 440 U.S. 268, 285 (1979) (quoting *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975)). See also *Moore*, 442 U.S. at 427-28 (stating "that a federal action should be stayed pending determination in state court of state-law issues central to the constitutional dispute."); *Elkins v. Moreno*, 435 U.S. 647 (1978); *Hodory*, 431 U.S. at 477 (stating that *Pullman* abstention "involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate or at least to alter materially, the constitutional question presented."); *Boehning v. Indiana State Employees Assn., Inc.*, 423 U.S. 6 (1975); *Askew v. Hargrave*, 401 U.S. 476 (1971); *Reetz v. Bozanich*, 397 U.S. 82 (1970); *Aldrich v. Aldrich*, 378 U.S. 540 (1964); *Dresner v. Tallahassee*, 378 U.S. 539 (1964); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960); *Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101 (1944); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

40. See, e.g., *Cincinnati v. Vester*, 281 U.S. 439, 448-49 (1930) (constitutional questions will not be decided unnecessarily).

41. *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970) (citing *Pullman*, 312 U.S. at 500).

42. See, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 375-76 (1964) (abstention not automatic merely because doubtful issue of state law exists); *Meredith v. City of Winterhaven*, 320 U.S. 228, 234 (1943) (absent a potential limiting constitutional issue, abstention is inappropriate because a challenged state law is difficult or uncertain).

43. See *Meredith*, 320 U.S. at 234 (describing the two constituent elements as "exceptional circumstances"). The Supreme Court has not been consistent in its determination of when the special circumstances warranting *Pullman* Abstention are present. Compare *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) (abstention inappropriate because no ambiguity existed in state statute) with *Reetz v. Bozanich*, 397 U.S. 82, 86-87 (1970) (abstention appropriate because it was "conceivable" that a state court would interpret the state statute at issue contrary to its clear import, thus avoiding a constitutional question).

44. Federal courts should avoid making forecasts of state law. *Pullman*, 312 U.S. at 499-500. The Court in *Baggett v. Bullitt*, 377 U.S. 360 (1964) noted that *Pullman* Abstention was generally appropriate only when state law issues are complex, unsettled, or unclear. *Id.* at 375 (citing *Propper v. Clark*, 337 U.S. 472, 492 (1949) (when federal court has been granted jurisdiction, abstention should not impede normal course of action)). Under *Baggett*, the federal

of state law must be susceptible<sup>45</sup> to a construction which will moot, limit or change the way the federal court will view the federal question.<sup>46</sup> For abstention to be appropriate, a court must determine when these two conjunctive elements are present on a case-by-case basis.<sup>47</sup> Because *Pullman* abstention is an equitable doctrine, it cannot be reduced to a simple formula.<sup>48</sup>

The Supreme Court expanded *Pullman* abstention in *Government and Civic Employees Organization Committee v. S. F. Windsor*.<sup>49</sup> The ruling in *Windsor* attempted to clarify whether state or federal courts were the appropriate forums to hear constitutional challenges to state law.<sup>50</sup> *Windsor* involved a federal suit to enjoin the enforcement of an Alabama statute that denied employment benefits to public employees who had joined labor unions.<sup>51</sup> The Court abstained from reaching the constitutional question by reasoning that the Alabama Supreme Court "might have construed the statute in a different manner" if the state court had been presented with the constitutional claim.<sup>52</sup> Because the Alabama court did not have an opportunity to construe

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courts pre-abstention analysis should take into consideration the nature of the unsettled question. *Id.* at 376-77.

45. Similar inconsistencies in the court's articulation of whether an unsettled state law question is subject to a limiting construction which is dispositive of the federal question. One articulation requires a challenged statute to be "obviously susceptible to a limiting construction." *Zwicker v. Koota*, 389 U.S. 241, 251 n.14 (1967) (where state statute not obviously susceptible of a limiting construction, abstention is inappropriate). A different articulation focuses on whether the state statute is "fairly" susceptible to such a construction. *See, e.g., Harman v. Forsinius*, 380 U.S. 528, 534-35 (1965) (where state statute not fairly susceptible to limiting construction, abstention inappropriate). A third articulation finds abstention appropriate where it is "conceivable" that the challenged state statute is amenable to a limiting construction. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 43-44 (1970) (abstention appropriate where "conceivable" that phrase in state statute amenable to limiting construction). The Court has suggested that these articulations of susceptibility are interchangeable. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

46. *Pullman*, 312 U.S. at 499-501; *see also Harris County Comm'rs v. Moore*, 420 U.S. 77, 84 (1975) (where resolution of unclear state law question would avoid or significantly modify the federal constitutional question, abstention is appropriate); *Kusper v. Pontikes*, 414 U.S. 51, 54-55 (1973) (same).

47. *Baggett*, 377 U.S. at 375.

48. *See Gonzales v. Gonzales*, 536 F.2d 453, 457 (1st Cir. 1976); *Ahrensfield v. Stephens*, 528 F.2d 193, 196-97 (7th Cir. 1975) (abstention is discretionary, judge made doctrine to be applied on a case-by-case basis only where special circumstances apply); *Muskegon Theaters, Inc. v. City of Muskegon*, 507 F.2d 199, 201 (6th Cir. 1974) (abstention is equitable doctrine turning on case-by-case facts).

49. 353 U.S. 364 (1974) (*per curiam*)

50. *Id.* at 366.

51. *Id.* at 365.

52. *Id.* at 366. Certification of unsettled state law issues to the state's highest court may be effective alternative to *Pullman* abstention. *See Bellotti v. Baird*, 428 U.S. 132, 150-51 (1976) (certification saves time, energy and resources and aids in developing cooperative judicial federalism).

the statute in light of the constitutional claim, the Court in *Windsor* concluded that an exercise of federal jurisdiction would result in an insufficient bona fide interpretation of Alabama state law.<sup>53</sup>

The *Windsor* court did not address the choice of forum issues that arise when a particular case involves both state and federal claims. In *England v. Louisiana Board of Medical Examiners*,<sup>54</sup> however, the Court recognized that federal plaintiffs have a right to return to federal court to have their federal claims heard after *Pullman/Windsor* abstention.<sup>55</sup> Under *England*, a federal plaintiff is required to "inform [the state court] what [the] federal claims are, so that the state statute may be construed 'in light of those claims.'"<sup>56</sup> The federal plaintiff must (1) state for the record that the constitutional claims are exposed in the state court proceedings; (2) solely for the purpose of resolving a state statute in light of the constitutional issues; and (3) not litigate the constitutional issues in state court because the plaintiff intends to return to federal court.<sup>57</sup> This procedure preserves the federal plaintiff's right to a choice of forum for the constitutional claims.<sup>58</sup>

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53. 353 U.S. at 366.

54. 375 U.S. 411 (1960).

55. *Id.* at 417 (citing *NAACP v. Button*, 371 U.S. 415, 427 (1963) (party has right to return to district court after obtaining state court construction from which federal court abstained)).

56. 375 U.S. at 420 (citations omitted).

57. *Id.* at 421.

58. *Id.* at 421-22. Federal litigants are not prohibited from litigating constitutional claims in state court. Litigants who submit claims to state court will be bound by the state court decision and will not be able to avoid a contrary decision by relitigating the claims in federal court. *Id.* at 419.

Commentators have criticized this procedure because the "shuttling" of cases between federal and state courts exacerbates the potential for delay already inherent in *Pullman* abstention. See Charles Alan Wright, *Law of Federal Courts* § 52 (4th ed. 1983); Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1985 (1974) (where author observes that substantial delay occurs due to "shuttling" between federal and state court). However, the *England* court justified this delay because the federal plaintiff had the option of avoiding the delay by submitting all issues to the state court. *England*, 375 U.S. at 418 (plaintiff may waive the right to federal court and submit his entire case to state courts, thus avoiding much of the delay and expense associated with the abstention process).

The delay associated with *Pullman* abstention merits particular consideration where a state statute is challenged on grounds that it inhibits First Amendment freedoms. *Baggett v. Bullitt*, 377 U.S. 360, 379 (1964). Because the delay from abstention would seriously inhibit the realization of First Amendment rights, these claims are exempt from *Pullman* abstention. See, e.g., *Zwicker v. Koota*, 389 U.S. 241 (1967); see also *Procunier v. Martinez*, 416 U.S. 396, 404 (1974) (where First Amendment challenge involved, abstention was inappropriate). Cf. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 308-09 (1979) (court abstained from deciding First Amendment challenge to an ambiguous state law limiting deceptive union publicity aimed at consumers of agricultural products). The Court's concern over the heightened cost of abstention involving First Amendment rights has also been expressed in cases involving basic civil liberties. See, e.g., *Harman v. Forssenius*, 380 U.S. 528, 537 (1965).



### B. *Burford Abstention—Deference to State Sovereignty and Policies*

*Burford* abstention emerged from *Burford v. Sun Oil Company*<sup>59</sup> and has its origins in the equitable powers of the court.<sup>60</sup> The “*Burford Doctrine*” considers the independence of state governments in carrying out domestic policy, and seeks to avoid conflict between state and federal courts.<sup>61</sup> Through *Burford* abstention, the federal courts can give “proper regard for the rightful independence of state governments in carrying out their domestic policy.”<sup>62</sup>

Subsequent case law has clarified this doctrine, recognizing essentially two applications.<sup>63</sup> The initial application, as set forth in the *Burford* case itself, is that abstention is appropriate where a determination by a federal court would be “disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”<sup>64</sup> The second application occurs when there are “difficult questions of state law bearing on policy problems of

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59. 319 U.S. 315 (1943).

60. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). Lower federal courts have disagreed on the propriety of abstention in cases involving legal rather than equitable claims. Compare *Tribune Co. v. Abiloe*, 66 F.3d 12, 16 (2d Cir. 1995) (“*Burford* abstention is generally appropriate in cases where equitable relief is sought”), *Garamendi v. Allstate Insurance Co.*, 47 F.3d 350, 356 (9th Cir. 1995) (“A District Court may not abstain under *Burford* when the plaintiff seeks only legal relief.”), *Riley v. Simmons*, 45 F.3d 764, 777 (3d Cir. 1995) (Nigaard, J. concurring) (“*Burford* abstention is simply not available when legal, rather than equitable or declaratory, relief is sought.”), *Fragoso v. Lopez*, 991 F.2d 876, 882 (1st Cir. 1993) (abstention is improper in cases asserting only inequitable claims), and *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 271 (3d Cir. 1991) (recognizing that *Burford* abstention is limited to federal courts sitting in equity, although case was in law), with *Riley*, 45 F.3d at 772, n.7 (Hutchinson, J., expressing doubt that the restriction against applying *Burford* abstention in non-equitable suits is still good law), *General Glass Industries v. Monsour Medical Foundation*, 973 F.2d 197, 202 (3d Cir. 1992) (“decisional authority remains inconclusive as to whether *Burford* abstention may be ordered only in cases of inequitable nature . . .”), *Taffet v. Southern Co.* 930 F.2d 847, 853 n.4 (11th Cir. 1991) (“Though abstention rulings premised upon principles of comity and federalism were originally developed in the context of actions seeking equitable relief, those principles have also been applied to actions seeking monetary damages.”), and *Lac D’Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033, 1044 (3d Cir. 1988) (“If the relief sought is legal and the disruption is of the extent and character suggesting that *Burford* abstention is appropriate, a refusal to abstain simply because the federal court is not sitting as a court of equity makes no sense.”).

61. *Quackenbush*, 517 U.S. at 727–28.

62. *Burford*, 319 U.S. at 318 (quoting *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935)).

63. *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (citing *Colorado River*, 424 U.S. at 814).

64. *Id.* In *New Orleans Public Service, Inc.*, the court found that the mere existence of a state administrative scheme of local interest was insufficient to justify *Burford* abstention. 491 U.S. at 361–64 (1989). The court noted that the federal adjudication must create the possibility of disrupting a state’s ability to develop and implement a regulatory response to the treatment of an “essentially local problem” before a *Burford* abstention is warranted. *Id.* at 362 (quoting *Alabama Public Service Comm’n v. Southern Ry.*, 341 U.S. 341, 347 (1951)).

substantial public import whose importance transcends the result in the case then at bar."<sup>65</sup>

In essence, *Burford* abstention seeks to serve as a preserving agent for the sovereignty of the states. Dual sovereignty is a defining feature of this country's system of government.<sup>66</sup> Under the federalist system, the states share concurrent sovereignty with the federal government which is only limited by the Supremacy Clause of the Constitution.<sup>67</sup> The Constitution created a federal government of limited powers<sup>68</sup> and the states retain sovereign authority where the Constitution does not recognize the supremacy of federal authority.<sup>69</sup> *Burford* abstention acknowledges that state legislatures have created their respective state court systems as an integral part of an administrative system that regulates activities of substantial interest to

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65. *Id.* at 361.

66. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). For the advantages and disadvantages of the dual sovereignty system see generally Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988).

Originally, under the Articles of Confederation, Congress could not directly legislate the American people, but could do so only with the approval of the states. *New York v. United States*, 505 U.S. 144, 163 (1992) ("Congress could not directly tax or legislate upon individuals; it had no explicit 'legislative' or 'governmental' power to make binding 'law' enforceable as such.") (citing Akhil Reed Amar, *Of Sovereignty & Federalism*, 96 YALE L. J. 1425, 1447 (1987) (quoting 1 J. Story, *Commentaries on the Constitution of the United States*, § 170 n.2. (1833))). The inadequacy of the federal government to directly legislate was responsible in part for the Constitutional Convention. *New York*, 505 U.S. at 163. The Constitutional Convention sought to restructure Congress and give it the power to legislate without the need of state legislatures. Alexander Hamilton addressed this issue in *The Federalist No. 16* by stating:

[the new national government] must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations . . . . The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals . . . .

*The Federalist No. 16* at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961). During the Constitutional Convention, delegates debated two different plans—the Virginia and New Jersey Plans—by which the federal government could exercise its powers. *New York*, 505 U.S. at 164. Under the Virginia Plan, Congress could exercise legislative authority directly without employing the states as intermediaries. *Id.* (citing 1 *Records of the Federal Convention of 1787*, at 21 (M. Farrand ed., 1911) [hereinafter "Records"]). The New Jersey Plan mirrored the status quo and Congress would continue to require the approval of the states before legislating. 1 *Records* at 243-44. A repeated objection to the New Jersey Plan was that it might require Congress to coerce the states into implementing legislation. *New York*, 505 U.S. at 164. Consequently, the Convention adopted a constitution in which Congress would exercise its legislative authority directly over individuals, rather than over states. *Id.* at 165. One reason for adopting the Virginia Plan was to avoid coercing states as separate sovereign entities. Instead, Congress would be able to legally coerce individuals. *Id.*

67. U.S. CONST. art VI, cl 2.

68. U.S. CONST. amend. X.

69. *Gregory*, 501 U.S. at 457; see generally, Merritt, *supra* note 66, at 3-10.

the state,<sup>70</sup> giving the courts broad discretion to participate in the development of regulatory policy.<sup>71</sup> *Burford* abstention also recognizes the discretion state courts have in devising remedies in the regulatory context and that, because state courts may be acting as part of the state's administrative system, federal participation in a case may interfere with a state's ability to create and develop a consistent regulatory policy.<sup>72</sup>

### C. Younger Abstention—Avoiding Interference with Pending State Criminal Proceedings

*Younger* abstention<sup>73</sup> was enunciated in *Younger v. Harris*.<sup>74</sup> Under *Younger* abstention, "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury."<sup>75</sup> The *Younger* doctrine represents a

70. See Peter M. Shane, *Judicial Independence and Accountability: Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 42–43 (Summer 1998) (discussing states' separation of powers issues raised by the administrative code of state courts).

71. Oftentimes state legislatures make the state courts an integral part of an administrative system that regulates activities of substantial interest to the state. When states grant regulatory power to their courts they grant two forms of discretion. First, they grant discretion to devise remedies that are appropriate given the particular facts at issue. Second, they vest in the courts the discretion to decide whether to grant relief at all.

72. Courts are divided on whether *Burford* abstention must be premised upon the existence of prior state administrative agency action. Compare *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 733 (1996) (Kennedy J. concurring) ("[t]he fact that a state court rather than an agency was chosen to implement California's scheme provided more reason, not less, for the Federal Court to stay its hand."), *Nelson v. Murphy*, 44 F.3d 497, 500–01 (7th Cir. 1995) (agencies role in dispute was not essential to *Burford* abstention), and *Friedman v. Revenue Management*, 38 F.3d 668, 671 (2d Cir. 1994) (*Burford* abstention appropriate in absence of agency action) with *St. Paul Insurance Co. v. Trejo*, 39 F.3d 585, 589 (5th Cir. 1994) ("[t]he concerns of governing the *Burford* abstention doctrine are not present in the instant case. St. Paul's lawsuit does not involve a state administrative proceeding.").

73. See generally *Ankenbrandt v. Richards*, 504 U.S. 689 (1992); *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989); *Deakins v. Monaghan*, 484 U.S. 193 (1988). The *Younger* doctrine has been criticized by scholars. See, e.g., Owen W. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977); John Gibbons, *Our Federalism*, 12 SUFFOLK U. L. REV. 1087 (1978); Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193; Aviam Soifer & Hugh C. MacGill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977).

74. 401 U.S. 37 (1971).

75. *Samuels v. Mackell*, 401 U.S. 66, 69 (1971). See also *Colorado River*, 424 U.S. at 816 (observing that "abstention is inappropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings."). Although the *Younger* doctrine has equitable origins, the Supreme Court has, in large part, abandoned the equitable foundation in cases subsequent to *Younger*. See George D. Brown, *When Federalism and Separation of Powers Collide—Rethinking the Younger Abstention* 59 GEO. WASH. L. REV. 114, 120 n.56 (1990) (post *Younger* cases have

judicial effort by federal district courts to avoid "undue interference" with state court proceedings.<sup>76</sup> The Supreme Court has extended the application of this type of abstention to include "civil enforcement proceedings,"<sup>77</sup> [including] civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions."<sup>78</sup>

In *Middlesex County Ethics Committee v. Garden State Bar Assoc.*,<sup>79</sup> the Supreme Court articulated a three-part test for application of *Younger* abstention: (1) the proceedings must be ongoing;<sup>80</sup> (2) the

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strayed from the equitable rationale); Rehnquist, *supra* note 29, at 1088 n. 219, 1089 (same); Howard B. Stravitz, *Younger Abstention Reaches a Civil Maturity: Pennzoil Co., v. Texaco Inc.*, 57 FORDHAM L. REV. 997, 1007 (1989) (*Younger's* progeny toppled the equitable pillar in favor of federalism and comity); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1042 (1985) (arguing that the Supreme Court has eroded the equitable foundation to the doctrine). Numerous lower court cases have addressed *Younger* as a case based on comity and federalism as opposed to equity. See, e.g., Warmus v. Melahn, 62 F.3d 252, 255 (8th Cir. 1995) *vacated* 517 U.S. 1241 (1996) (*Younger* abstention has its roots in comity and federalism); Schilling v. White, 58 F.3d 1081, 1084 n.3 (6th Cir. 1995) (*Younger* doctrine is founded in federalism and comity); Gwyned Properties v. Lower Gwyned Township, 970 F.2d 1195, 1199-2000 (3d Cir. 1992) (same).

76. Several federal courts have concluded that adjudication of damage actions does not "unduly" interfere with state proceedings to a level contemplated by the Supreme Court. See, e.g., *Alexander v. Ieyoub*, 62 F.3d 709, 713 (5th Cir. 1995) ("[W]e conclude that the district court abused its discretion by refusing, based on its unwarranted reliance on *Younger*, to exercise its jurisdiction over Alexander's § 1983 [damages]"); *Lebbos v. Judges of Superior Court*, 883 F.2d 810, 817 (9th Cir. 1989) ("Additionally, we do not believe that consideration of the section 1983 damages claim . . . will in any way interfere with the state proceedings. The interest of comity and federalism underlying the *Younger* abstention are therefore inapplicable.") *Lapat v. Serber*, Civ. A. 95-1021, 1995 WL 481493 at \*2 (E.D. Pa. August 1, 1995) ("[d]efendants have not demonstrated as a matter of law . . . how the proceedings in this court will interfere with the state court proceedings."); *Rubin v. Smith*, 817 F. Supp. 987, 992-93 (D. N.H. 1993) (in a § 1983 action for damages, abstention was rejected "because this court's decision will not enjoin or interfere with any state proceeding [which is] pending. The present situation is not the type contemplated by the *Younger* abstention doctrine") (citations omitted).

77. *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977); *Moore v. Sims*, 442 U.S. 415, 423 (1979)). In *Huffman*, 420 U.S. 592 (1975) the court expanded *Younger* to encompass quasi-criminal cases. Following *Huffman* the Court expanded *Younger* to include not only quasi-criminal cases. See *Moore v. Simms*, 442 U.S. 415 (1979) (applying *Younger* to a Texas child welfare agency case involving the loss of custody of a child based on allegations of child abuse); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (applying *Younger* to attachment proceedings); *Juidice v. Vail*, 430 U.S. 327 (1977) (applying *Younger* to appeals of contempt of court and judgment creditor actions). *Younger* has also been applied to non-judicial cases. See, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 629 (1986); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 299 (1984).

78. *New Orleans Public Serv.*, 491 U.S. at 368 (citing *Juidice v. Vail*, 430 U.S. 327, 336, n. 12 (1977) (civil contempt order); *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 13 (1987) (requirement for the posting of bond pending appeal)).

79. 457 U.S. 423 (1982).

80. *Id.* at 432.

proceedings must implicate important state interests;<sup>81</sup> and (3) there must be an adequate opportunity in the state court proceeding to raise constitutional challenges.<sup>82</sup>

There is some confusion among the courts as to whether *Younger* abstention is jurisdictional or discretionary. The Supreme Court first determined that individual parties can waive the application of *Younger*.<sup>83</sup> Later, the Court permitted the states to waive application of *Younger*.<sup>84</sup> The lower federal courts, however, have occasionally recited the doctrine as being absolute.<sup>85</sup>

Prior to the Court's decision in *Quackenbush v. Allstate Insurance Company*,<sup>86</sup> a question existed as to whether *Younger* abstention was appropriate when a state court defendant sought legal relief.<sup>87</sup> A significant number of federal district courts have invoked *Younger* abstention where legal relief is being sought by the federal court plaintiff.<sup>88</sup> A unanimous Court in *Quackenbush* held that a federal

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81. *Id.*

82. *Id.* See also *Ohio Civil Rights Comm'n v. Dayton Christian Sch. Inc.*, 477 U.S. 619 (1986) (holding that even if complainants in an administrative hearing could not raise First Amendment objections, it was sufficient that the objections could be raised in judicial review of the administrative hearings by the state courts).

83. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 396–97 n.3 (1975).

84. See, e.g., *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479–80 (1977).

85. See, e.g., *Trust & Inv. Advisors Inc. v. Hogsett*, 43 F.3d 290, 294 (7th Cir. 1994) (“unlike other forms of abstention . . . which explicitly vest[] the district court ‘with discretion’ . . . application of the *Younger* doctrine is absolute . . . . [W]hen a case meets the *Younger* criteria the district court must abstain.”) (citing *Harman v. Forssenius*, 380 U.S. 528, 534 (1965)); *Cage v. Fairman*, 95-C-3387, 1995 WL 743752, at \*2 (N.D. Ill. December 13, 1995) (“under *Younger* and its progeny, federal courts must abstain . . . .”); *Sun Refining and Marketing Co. v. Brennan*, 921 F.2d 635, 639 (6th Cir. 1990) (“[W]hen the case is properly within the *Younger* category of cases, there is no discretion on the part of federal courts to grant injunctive relief.”).

86. 517 U.S. 706 (1996).

87. *Id.* at 719. (citing *Deakins v. Monaghan*, 484 U.S. 193, 202, and n. 6 (1988) (reserving the question whether *Younger* requires abstention in an action for damages)). See Jeremy D. Sosna, Comment, *Quackenbush v. Allstate Insurance Co.: The Continuing Saga of the Younger Doctrine*, 82 IOWA L. REV. 275, 277–78 (1996).

88. See, e.g., *Schilling v. White*, 58 F.3d 1081, 1083–84 n.3 (6th Cir. 1995) (electing to stay proceedings rather than adjudicate a § 1983 damages action); *Simpson v. Rowan*, 73 F.3d 134, 137–39 (7th Cir. 1995) (holding that the *Younger* doctrine authorizes the court to stay the damages action pending the outcome of state court proceedings while not directly permitting abstention) *cert. denied* 519 U.S. 833 (1996); *Kyricopoulos v. Town of Orleans*, 967 F.2d 14, 15–16 (1st Cir. 1992) (*in dicta* the court inferred that dismissal of a damages action pursuant to *Younger* was proper. However, the court did not address the issue because the parties waived application of the abstention doctrine); *Traverso v. Penn.*, 874 F.2d 209, 213 (4th Cir. 1989) (staying the federal damages action); *Williams v. Hepting*, 844 F.2d 138, 144–45 (3d Cir. 1988) (same) *cert. denied* 488 U.S. 851 (1988); *Mann v. Jett*, 781 F.2d 1448, 1449 (9th Cir. 1986) (*per curiam*) (where damages action would “have a substantially disruptive effect upon ongoing state proceedings *Younger* abstention may be appropriate”) (citations omitted); *Giulini v. Blessing*, 654 F.2d 189, 193–94 (2d Cir. 1981) (staying a damages action pursuant to the *Younger*

district court does not have the authority to abstain when the district court plaintiff seeks only non-discretionary relief.<sup>89</sup> While the *Quackenbush* decision only expressly spoke in relation to *Burford* abstention, because of the context of and justifications for *Younger* abstention are based upon equitable principles, *Quackenbush* may also be regarded as a constraint on a federal court's power to invoke the principles of *Younger* in cases at law.<sup>90</sup>

#### D. Colorado River Abstention—Only Where There Is an “Exceptional Circumstance”

The Supreme Court has subsequently tied the above variations on abstention together under the broader category of “exceptional circumstances.”<sup>91</sup> While emphasizing that the abstention doctrine generally remains a very narrow exception to the axiom requiring the exercise of federal jurisdiction,<sup>92</sup> the Supreme Court, in *Colorado River Water Conservation District v. United States*,<sup>93</sup> held that where there are “exceptional circumstances” relating to “[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,”<sup>94</sup> these exceptional circumstances should be weighed against the duty to exercise federal jurisdiction.<sup>95</sup>

In *Will v. Calvert Fire Insurance Co.*,<sup>96</sup> a plurality of the Court contradicted the *Colorado River* “exceptional circumstances” doctrine. Justice Rehnquist, writing for the plurality, observed that whether the district court should accept the concurrent jurisdiction of a state court was a matter committed to the sound discretion of the district court.<sup>97</sup>

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doctrine); *Parkhurst v. Wyoming*, 641 F.2d 775, 777 (10th Cir. 1981) (same); *McCurry v. Allen*, 606 F.2d 795, 799 (8th Cir. 1979) (same) *reversed on other grounds* 449 U.S. 90 (1980).

89. *Quackenbush*, 517 U.S. at 730. The Court did not delineate between broad categories of “equitable” or legal relief. *Id.* Reviewing various abstention doctrines as a function of “the historic discretion exercised by federal courts ‘sitting in equity.’” *Id.* at 718. After distinguishing all authority to the contrary, *id.* at 720, the Court held that abstention in damages actions contravened the principles of abstention. *Id.* at 721.

90. See *Sosna*, *supra* note 87, at 283–84.

91. *Colorado River*, 424 U.S. at 814–17.

92. *E.g.*, the Supreme Court has recently observed that “the power to dismiss recognized in *Burford* represents an ‘extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it.’” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (quoting *Colorado River*, 424 U.S. at 813).

93. 424 U.S. 800.

94. *Id.* at 817 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)).

95. *Colorado River*, 424 U.S. at 817–19.

96. 437 U.S. 655, 665–67 (1978).

97. *Id.* at 664.

Justice Rehnquist observed that "it is well established that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction."<sup>98</sup> However, Justice Rehnquist also added that "it is equally well settled that a district court is 'under no compulsion to exercise that jurisdiction,' . . . where the controversy may be settled more expeditiously in the state court."<sup>99</sup> He emphasized that the "right to proceed with a duplicative action in a federal court can never be said to be 'clear and undisputable.'"<sup>100</sup> Five justices joined the plurality in *Calvert*, establishing the principle that any likelihood of duplicative litigation was sufficient to justify abstention.<sup>101</sup> This plurality contradicts the exceptional circumstances requirement of *Colorado River*.<sup>102</sup>

The conflicting holdings of *Colorado River* and *Calvert* were clarified in *Moses Cone Memorial Hospital v. Mercury Construction Corp.*<sup>103</sup> The Court in *Moses* held that the *Colorado River* "exceptional circumstances" test should be used by district courts in determining to stay an action in favor of state court proceedings.<sup>104</sup> In reaffirming the *Colorado River* test, the *Moses* court formulated two additional factors for the "exceptional circumstances" test: (1) the determination of which forum's substantive law would govern the merits of the litigation; and (2) the adequacy of the state forum to protect the rights of parties.<sup>105</sup> The court in *Moses* rejected the *Calvert* plurality and the argument that *Calvert* had substantively changed the law,<sup>106</sup> reaffirming the doctrine that federal courts have a "[virtual] unflagging obligation" to exercise the jurisdiction given to them.<sup>107</sup>

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98. *Id.* at 662 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).

99. *Id.* at 662-63 (quoting *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942)).

100. *Id.* at 666 n.8.

101. *Id.* at 663-64.

102. 424 U.S. at 818-20 (1976). Several lower courts reached different views of *Calvert*'s significance. Compare *Klingenberg v. Bobbin Publications, Inc.*, 530 F. Supp. 173 (D. D.C. 1982) (abstention appropriate where similar parties are litigating similar claims in state and federal court) and *American Motorists Ins. Co. v. Phillip Carey Corp.*, 482 F. Supp. 711 (S.D.N.Y. 1980) (same) with *Western Auto Supply Co. v. Anderson*, 610 F.2d 1126, 1127 (3d Cir. 1979) (rejecting argument that *Calvert* expanded trial court discretion).

103. 460 U.S. 1 (1983).

104. *Id.* at 13-19.

105. *Id.* at 23-27. Five justices in *Calvert* (four dissenters and Justice Blackman concurring) supported the consideration of controlling state law as a new factor. *Calvert*, 437 U.S. at 677 (Blackman, J. concurring).

106. *Id.* at 16-19.

107. *Id.* at 15. After *Moses* the circuit courts were divided over which standard governed a district court's decision to stay or dismiss a declaratory judgment action in which there were parallel state proceedings. The Third, Fourth, Fifth and Ninth circuits applied the discretionary standard articulated in *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942) and *Calvert*.

While the *Pullman*, *Burford* and *Younger* abstention doctrines are the three general categories of "exceptional circumstances,"<sup>108</sup> if the facts do not fall within the three general categories of abstention, there are other principles that can give rise to application of abstention.<sup>109</sup>

### E. Brillhart—Abstention under the FDJA

#### 1. Brillhart Abstention Generally

The various doctrines of abstention discussed in Part I have been held to apply to specific instances involving declaratory judgment actions.<sup>110</sup> However, a separate line of cases addresses the application of abstention in specific relation to Federal Declaratory Judgment Act actions that interpret the boundaries of the district courts' discretion to entertain such actions.<sup>111</sup> As was previously discussed, the doctrine

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*See, e.g.,* Terra Nova Insurance Co. v. 900 Bar, Inc., 887 F.2d 1213, 1223 (3d Cir. 1989); Mitcheson v. Harris, 955 F.2d 235, 237–38 (4th Cir. 1992) (the "exceptional circumstances" test of *Colorado River* and *Moses* is inapplicable in declaratory judgment actions); Travelers Ins. Co. v. Louisiana Farm Bureau Federation Inc., 996 F.2d 774, 778 n.12 (5th Cir. 1993) (same); Continental Casualty Co. v. Robsac Industries, 947 F.2d 1367, 1369 (9th Cir. 1991); Chamberlain v. Allstate Ins. Co., 931 F.2d 1361, 1366 (9th Cir. 1991) (*Colorado River* test does not apply to declaratory relief actions because they have "special status").

However, other circuit courts have applied the narrow exceptional circumstances test developed in *Colorado River* and expanded in *Moses*. *See, e.g.,* Employers Insurance of Wassau v. Missouri Electric Works, 23 F.3d 1372, 1374 n.3 (8th Cir. 1994) (following *Colorado River* and *Moses* the district court was not justified in staying or dismissing a declaratory relief action absent "exceptional circumstances"); Lumberman's Mutual Casualty Co. v. Connecticut Bank & Trust Co., 806 F.2d 411, 413 (2d Cir. 1986) (same). A middle ground between these two positions can be found. *See, e.g.,* Fuller Co. v. Ramon I. Gill, Inc., 782 F.2d 306, 308–11 (1st Cir. 1986) (where the state court has expended significant resources through the adjudicatory process of the state law claims, federal courts may decline to exercise jurisdiction over a declaratory judgment action).

108. *Colorado River*, 424 U.S. at 814–17.

109. *Id.* at 817 (stating that "[a]lthough this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts.").

110. *See, e.g.,* Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297 (1943) (holding that a federal court must abstain from hearing declaratory judgment action challenging constitutionality of a state tax); *Samuels v. Mackell*, 401 U.S. 66, 69–70 (1971) (extending *Younger* abstention to declaratory judgment actions); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995) (stating that federal courts have "discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites").

111. In *Quackenbush v. Allstate Ins. Co.*, the Supreme Court found that the various forms of the abstention doctrine had been extended to "certain classes of declaratory judgments, the granting of which is generally committed to the court's discretion." 517 U.S. at 718. It is interesting to note that in *Huffman*, 319 U.S. at 297, and *Samuels*, 401 U.S. at 69–70, the Supreme Court recognized that the actions were brought pursuant to the FDJA but did not



of abstention in FDJA actions stems from the Act itself, which states the court “may declare the rights and other legal relations of any interested party.”<sup>112</sup> The significance of this language is that, as opposed to other federal actions, the granting of jurisdiction over FDJA actions is discretionary and not compulsory.<sup>113</sup> Based upon this language, the federal courts have essentially created a separate variation of abstention specifically relating to jurisdiction under the FDJA.

The most common scenario giving rise to application of the modern abstention doctrine in the FDJA context occurs when a parallel case is pending in state court at the time the federal district court is being asked to exercise its discretion to accept jurisdiction under FDJA.<sup>114</sup> The court’s discretion to deny jurisdiction in those cases is generally analyzed using the doctrine set forth in *Brillhart v. Excess Insurance Company of America*.<sup>115</sup> In *Brillhart*, the Excess Insurance Company of America brought suit for declaratory relief in federal court to determine its obligation in a pending state court proceeding.<sup>116</sup> The *Brillhart* court found that it would “ordinarily be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties.”<sup>117</sup>

In determining whether to abstain, the court in *Brillhart* suggested that district courts should look to whether the controversy can better be settled in the state court proceeding.<sup>118</sup> The Court stated that this analysis may require “inquiry into the scope of the pending state court proceeding and the nature of defenses open there.”<sup>119</sup> Further, “[t]he federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.”<sup>120</sup>

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apply the discretion under this statute but rather applied different forms of the abstention doctrine.

112. 28 U.S.C. § 2201 (emphasis added).

113. See *Wilton v. Seven Falls Co.*, 515 U.S. at 286–87; *Government Employees Ins. Co. v. Dizol*, 133 F.3d at 1223.

114. *Maryland Casualty Co. v. Knight*, 96 F.3d 1284, 1288 (9th Cir. 1996).

115. 316 U.S. 491 (1942).

116. *Id.* at 492.

117. *Id.* at 495.

118. *Id.*

119. *Id.*

120. *Id.*

Doubt on the validity of the application of the Supreme Court's analysis in *Brillhart* was cast by the *Colorado River* line of cases discussed in Part I.D. above.<sup>121</sup> However, in *Wilton v. Seven Falls Company*,<sup>122</sup> the Supreme Court confirmed that the *Brillhart* test, not the "exceptional circumstances" test described in *Colorado River*, governs a district court's exercise of discretion in a FDJA action during the pendency of parallel state court proceedings.<sup>123</sup> Thus, the abstention applicable under the FDJA was a unique, self-contained division of the doctrine. Unlike all other variations of the abstention doctrine, "exceptional circumstances" did not have to exist for the court to abstain. A lower bar had been set.

The *Brillhart* analysis exists to support the important issues of community, judicial economy, and federalism.<sup>124</sup> Those issues are generally of concern when there is a separate pending state court case containing additional state law issues, especially if the state action contains non-removable state court claims. The *Brillhart* analysis asks whether another state case involving the same parties would be able to also address the controversy in the declaratory judgment action.<sup>125</sup> These questions imply the existence of a separate state court action that could add a request for declaratory relief as an additional claim, as opposed to the situation where the "state case" is identical to the federal court action.<sup>126</sup>

Accordingly, the application of abstention under the FDJA as set forth in *Brillhart* is limited. Specifically, the court in *Wilton* noted that it was not making a finding as to the appropriate boundaries of discretion in cases in which there were no parallel pending state court proceedings.<sup>127</sup> The court in *Wilton* solely held that application of the *Brillhart* test was appropriate when a parallel proceeding, already underway in state court, presented an opportunity for the controversy in the declaratory judgment action to be heard.<sup>128</sup> The *Brillhart*

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121. In *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), the plurality endorsed the *Brillhart* reasoning in contradiction to the "exceptional circumstances" test set forth in *Colorado River*. *Id.* at 655-57. However, the *Moses Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) decision confirmed the validity of the "exceptional circumstances test." *See supra*, Part I.D.

122. 515 U.S. 277 (1995).

123. *Id.* at 289-90.

124. *Dizol*, 133 F.3d at 1226.

125. *See Wilton*, 515 U.S. at 282-283.

126. *See id.*

127. *Id.* at 290.

128. The Ninth Circuit has recognized that the *Wilton* decision is silent as to the boundaries of discretion in this scenario, and also recognized the need for guidance on the issue. *See Budget Rent-A-Car v. Crawford*, 108 F.3d 1075, 1079-1080 (9th Cir. 1997). In *Crawford*, the Ninth Circuit did not set a clear guideline for asserting discretion in declaratory judgment

analysis, therefore, has not been held to apply to cases that do not also have pending parallel state court actions.<sup>129</sup>

## 2. Application of *Brillhart* Abstention

While the Supreme Court has not specifically delineated a set of factors to be applied pursuant to *Brillhart*, some of the lower courts have done so. Relevant to the specific discussion of this article, the Ninth Circuit has provided one of the most comprehensive lists of factors for assessing the application of abstention under *Brillhart*. The Ninth Circuit has determined that the *Brillhart* analysis advises the district court to avoid: (1) needless determination of state law issues; (2) declaratory actions filed as a means of forum shopping;<sup>130</sup> and, (3) duplicative litigation.<sup>131</sup>

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actions where there were no parallel state court cases pending. Instead, the court held that a district court must first weigh whether existing state court remedies will provide adequate remedies. *Id.* at 1081–82. *Crawford* was overruled by *Government Employees Ins. Co. v. Dizon*, 133 F.3d at 1227. With that portion of *Crawford* overturned, the Ninth Circuit is once again left without guidance for the boundaries of discretion in actions like those presented in *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800 (9th Cir. 2002). *Crawford* also held abstention could be justified if the declaratory judgment action was filed in anticipation of a filing of a state court proceeding and in fact was a form of forum shopping. *Crawford*, 108 F.3d at 1080–81.

129. *Wilton*, 515 U.S. at 289–90.

130. The term “forum shopping” was first used in a judicial opinion in 1951. See *Covey Gas & Oil Co. v. Checketts*, 187 F.2d 561, 563 (9th Cir. 1951). Earlier, the phrase “shopping for a forum” was used by the Court in *Miles v. Illinois Central Railroad*, 315 U.S. 698, 706 (1942) (Jackson, J. concurring). The concept was targeted in *Erie Railroad v. Thompkins*, 304 U.S. 64 (1938).

As a phrase, “forum shopping” has relative limited descriptive content because litigants make forum choices either through action or inaction any time that a decision would affect the selected forum. As an example, plaintiffs have primary control over forum selection. See, e.g., *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398–99 (1987) (plaintiff is the “master of the claim.”) Defendants can also engage in forum selection activity through removal of a case from state court to federal court. See 28 U.S.C. § 1441(a) (1982). Defendants indirectly participate in forum selection by challenging personal jurisdiction. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). A dismissal can be sought on the basis of *forum non conveniens*. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); 28 U.S.C. § 1404(a) (permitting a federal court to transfer a civil action to a different district “[f]or the convenience of the parties and witnesses, in the interest of justice.”). Forum shopping can indirectly occur where a defendant accepts jurisdiction where constitutionally sufficient minimum contacts do not exist. See, e.g., *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982).

Some commentators have viewed forum shopping as improperly manipulative of the system. See generally John B. Corr, *Thoughts on the Vitality of Erie*, 41 AM. U. L. REV. 1087, 1111 (1992) (the term forum shopping has a “disreputable” connotation); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989) (“As a rule, counsel, judges and academicians employ the term ‘forum shopping’ to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit. But in spite of the phrase’s pejorative connotation, forum shopping remains popular.”). An interesting response can be found in *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), in which the court noted that “parties may legitimately try to obtain the jurisdiction of federal courts, as long as they

Upon examining the first factor of the *Brillhart* analysis, whether the determination of state law by a federal court is unnecessary, it can be observed that cases in federal court by way of diversity of citizenship often rest on the application of the state law.<sup>132</sup> Therefore, this factor bears tangential relevance to the determination of the application of abstention under certain limited circumstances. Such circumstances where the federal court should abstain under this factor include: (1) when the case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar;" (2) when the case involves essential local issues arising out of a complicated state regulatory scheme, such as sensitive areas of social policy; or (3) when the adjudication of the case by a federal court "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."<sup>133</sup>

The lack of a novel issue of a state law, or additional state law claims, weighs in favor of retaining federal jurisdiction.<sup>134</sup> When a routine state law issue is in question, a federal court can "just as efficiently decide" the matter as a state court can.<sup>135</sup> Nevertheless, the mere fact that a state law issue is difficult or the answer is uncertain does not, in and of itself, automatically constitute grounds for abstention.<sup>136</sup> In fact, the presence of state law issues in a federal

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lawfully qualify under some of the grounds that allow access to this form of limited jurisdiction." *Id.* at 1068 (quoting *U.S.I. Properties Corp. v. M.D. Construction Co.*, 860 F.2d 1, 6 (1st Cir. 1988)). "[A] party's motive in preferring a federal tribunal is immaterial." *Id.* (citing *Chicago v. Mills*, 204 U.S. 321, 330 (1907)). Thus, the *Nolan* court acknowledged the legitimacy of forum shopping when the shopping is done within the rules.

131. These factors were recognized and adopted by the Ninth Circuit. See *Government Employees Ins. Co. v. Dizol*, 133 F.3d at 1225; *Continental Casualty Co. v. Robsac Ind.*, 947 F.2d 1367, 1371-1373 (9th Cir. 1991).

132. These factors were recognized and adopted by the Ninth Circuit. See *Dizol*, 133 F.3d at 1225; *Continental Casualty Co. v. Robsac Ind.*, 947 F.2d 1367, 1371-1373 (9th Cir. 1991).

133. *Colorado River*, 424 U.S. at 813-17. See also *Ripplinger v. Collins*, 868 F.2d 1043, 1048 n.5 (9th Cir. 1989); *Lehman v. City of Louisville*, 967 F.2d 1474, 1478 (10th Cir. 1992).

134. See, e.g., *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998) (holding that because declaration of coverage for vandalism coverage under commercial property insurance policy did not involve novel issues of state law, the district court did not abuse its discretion in retaining jurisdiction); *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 591 n.10 (5th Cir. 1994) ("A district court's dismissal of a lawsuit simply because it involves an issue of state law . . . would not be proper.").

135. *Kapiloff*, 155 F.3d at 494.

136. *In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 776 (2d Cir. 1996); *In re Abbott Labs*, 51 F.3d 524, 529 (5th Cir. 1995) (Novelty or complexity of state law issues standing alone is not enough to compel abstention.); *Fragoso v. Lopez*, 991 F.2d 878, 883 (1st Cir. 1993) (Presence of difficult or unresolved questions of local law does not, without more, justify abstention by federal court properly sitting in diversity.).

declaratory judgment action is rarely considered a proper ground to abstain from jurisdiction.<sup>137</sup>

The second factor of the Ninth Circuit's *Brillhart* analysis, whether the declaratory action was filed as a means of forum shopping, "usually is understood to favor discouraging an insurer from forum shopping. For example, filing a federal court declaratory action to see if it might fare better in federal court at the same time the insurer is engaged in a state court action."<sup>138</sup> In other words, federal

137. See, e.g., *Safety Nat'l Cas. Corp. v. Bristol-Myer Squibb Co.*, 214 F.3d 562, 566 (5th Cir. 2000) ("[O]nly rarely will 'the presence [a] state law issue[] weigh[] in favor of' abstention, and even where the state court can adequately protect all parties, this fact 'can only be a neutral factor or one that weighs against . . . abstention.'"); *Ryan v. Johnson*, 115 F.3d 193, 199 (3d Cir. 1997) (holding that abstention cannot be justified merely because case arises entirely under state law); *Employers Ins. of Wausau v. Missouri Elec. Works, Inc.*, 23 F.3d 1372, 1376 (8th Cir. 1984) (holding that presence of state law issues weigh in favor of abstention only in rare circumstances).

138. *Aetna Cas. Co. v. Krieger*, 181 F.3d, 1113, 1119 (9th Cir. 1999). The Supreme Court has denounced state and federal forum shopping on grounds of comity and parity. See, e.g., *Allen v. McCurry*, 449 U.S. 90 (1980); *Younger v. Harris*, 401 U.S. 37 (1971). The Court has countenanced interstate forum shopping. See, e.g., *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770 (1984). Courts have offered little justification for differentiating their treatment of state-federal and interstate forum shopping. See *Lea Brilmayer & Ronald D. Lee, State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833, 833-35 (1985); *Neuborne, supra* note 29, at 1105; Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 96 (1992) ("preventing interstate forum shopping only encourages interstate forum shopping. As long as the states have different rules on this subject, sophisticated litigants will travel to the state in which the law is most favorable."). There are three reasons that are generally used to criticize forum shopping: (1) forum shopping undermines the authority of substantive state law, see *Erie Railroad v. Thompson*, 304 U.S. at 78-79; (2) forum shopping overburdens certain courts and creates unnecessary expenses as litigants pursue the most favorable rather than the simplest or closest forum; (3) forum shopping may create a negative popular perception about the equity of the legal system. See *Hanna v. Plumber*, 380 U.S. 460, 468 (1965). Some courts generally discourage forum shopping. See, e.g., *Posadas de Puerto Rico Assoc., Inc. v. Asociacion de Empleados de Casino de Puerto Rico*, 873 F.2d 479, 485 (1st Cir. 1989) (observing that it is "wise" to "discourage forum shopping"); *Ojeda Rios v. Wigen*, 863 F.2d 196, 199 (2d Cir. 1988) (observing that "forum shopping is to be discouraged.").

*Erie Railroad v. Thompson*, 304 U.S. 64 (1938) abolished the long held doctrine under *Swift v. Tyson*, 41 U.S. 1 (1842), whereby federal courts in diversity cases followed state rules of decision on certain local issues but otherwise were free to create and follow common law. Currently the Rules of Decision Act, 28 U.S.C. § 1652 (1982), requires federal courts to apply state law in diversity cases. *Erie* eliminated the incentive for state and federal forum shopping by requiring federal courts in diversity cases to apply the substantive law of the state in which they sit. *Erie*, 304 U.S. at 78. See also *Edelson v. Soricelli*, 610 F.2d 131, 141 (3d Cir. 1979) (commenting on the *Erie* decision: "[t]he decision to require that federal courts apply state substantive law in diversity cases represented a preference for vertical uniformity of substantive law within each state over horizontal uniformity among federal courts nationwide.") (quoting *Witherow v. Firestone Tire and Rubber Co.*, 530 F.2d 160, 164 (3d Cir. 1976)). See also J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) ("the lack of uniformity in state substantive law, compounded by proliferation by state long arm statutes, has made forum shopping, among both federal and state courts, a

courts should generally decline to entertain "reactive" declaratory judgment actions.<sup>139</sup> Reactive litigation finds its most common application in the insurance law context, where declaratory judgment actions are routinely used by insurance companies and insureds to anticipate each others claims.<sup>140</sup> Thus, a declaratory judgment action by an insurance company against its insured during the pendency of a "non-removable"<sup>141</sup> state court action presenting the same issues of state law is a "reactive" litigation.<sup>142</sup>

national and legal past time.") The *Erie* doctrine was extended in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). In *Klaxon* the Court held that federal courts must also apply the forum state's choice of law rules. *Id.* at 496.

139. *Dizol*, 133 F.3d at 1225.

140. See *Federal Reserve Bank of Atlanta v. Thomas*, 220 F.3d 1235, 1246 n.11 (11th Cir. 2000) (declaratory judgment actions are "routinely used by potential litigants").

141. Federal courts are courts of limited jurisdiction, *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996), and therefore any case which is removed must be one which, at the time of removal, could have been brought in federal court initially. See, e.g., *Cervantez v. Bexar County Civil Serv. Comm'n*, 99 F.3d 730, 733 (5th Cir. 1996).

Removal of cases to federal court is governed by 28 U.S.C. § 1441-1452 (1982) and (Supp. IV 1986) as amended by the JUDICIAL IMPROVEMENTS AND ACCESS TO JUSTICE ACT PUB. L. 100-702 § 1016, 102 stat. 4642, 4669-70 (1988). A defendant's removal of a case to federal court is subject to two general remand statutes: 28 U.S.C. §§ 1441(c) and 1447(c) (1982), as amended by the JUDICIAL IMPROVEMENTS AND ACCESS TO JUSTICE ACT PUB. L. 100-102 § 1016, 102 stat. 4642, 4670 (1988). Both the plaintiff and the court may question the propriety of the removal under these statutes. See, e.g., *Mark Herrmann, Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 ARIZ. ST. L.J. 395 (1987). Removal statutes are strictly construed, and all doubts regarding removability are resolved in favor or remand to state court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 105-06 (1941). The burden of establishing removal jurisdiction rests with the party seeking removal, and the burden applies both to establishing federal jurisdiction and to following the appropriate procedures. *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995).

Federal question jurisdiction exists over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1994). For federal question jurisdiction, a case is deemed to "arise under" federal law for § 1331 purposes whenever federal law, either expressly (see *Feibelman v. Packard*, 109 U.S. 421 (1883)) or impliedly (*Bivens v. Six Unknown Named Defendants of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)) creates the cause of action upon which plaintiff is suing. See *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 2 (1983). The suit must "really and substantially" involve a dispute regarding the "validity, construction or effect of the law upon the determination of which the result depends." *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912). See also *Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (federal question jurisdiction requires that the federal issue "be an element, and an essential one, of plaintiff's cause of action").

Statutory diversity jurisdiction exists over controversies between citizens of different states, and between a state or citizen thereof and a foreign state or its citizens where the amount in controversy exceeds \$75,000.00 exclusive of interest and costs. 28 U.S.C. § 1332 (1994). The bulk of removal disputes involve diversity or federal question jurisdiction. *Gordon D. Polozola, The Battle of Removal—Is Delay the Ultimate Weapon?: A Note on Martine v. National Tea Co.*, 54 LA. L. REV. 1419, 1423-24 (1994).

142. *Continental Cas. Co. v. Robsac, Ind.*, 947 F.2d 1367, 1372 (9th Cir. 1991) (noting that allowing declaratory judgment action to proceed while there is a non-removable state action would circumvent diversity jurisdiction).

The third *Brillhart* factor given by the Ninth Circuit, whether the action would be duplicative of an action already proceeding before a state court, stems from the concern expressed by the Supreme Court that "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided."<sup>143</sup> Essentially, this *Brillhart* factor is focused on federal interference with ongoing state litigation.<sup>144</sup> Therefore, the application of this factor requires the presence of a pending parallel state proceeding.

The *Brillhart* factors enunciated by the Ninth Circuit are not exhaustive.<sup>145</sup> Several circuits have expanded these factors,<sup>146</sup> and the Ninth Circuit itself has held that a district court may also consider, for example, whether a subsequent declaratory judgment action (either in federal or state court) is filed merely for the purposes of procedural fencing.<sup>147</sup> In addition, it has been observed that a district court may consider (1) whether a declaratory action will settle all aspects of the controversy; (2) whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory action is being sought merely for the purpose of obtaining

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143. *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir. 1991).

144. *Id.*

145. *Dizol*, 133 F.3d at 1225 n.5.

146. See, e.g., *State Auto Ins. Companies v. Summy*, 234 F.3d 131, 134 (3d Cir. 2000) (stating the following considerations: 1) "[a] general policy of restraint when the same issues are pending in a state court;" 2) "[a]n inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion;" 3) "[a]voidance of duplicative litigation."); *Scottsdale Ins. Co. v. Routh*, 211 F.3d 964, 968 (6th Cir. 2000) (considering the following factors: "(1) whether the judgment would settle the controversy; (2) whether the declaratory judgment would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for *res judicata*'; (4) whether the use of a declaratory action would increase the friction between federal and state courts and improperly encroach on state jurisdiction;" (5) "whether there is an alternative remedy that is better or more effective;" (6) "whether the underlying factual issues are important to an informed resolution of the case; (7) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and (8) whether there is a close nexus between the underlying factual and legal issues and state law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action."); *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937) (identifying the following factors for a district court to use in determining whether to hear a declaratory judgment action: (1) whether declaratory relief will serve a useful purpose in clarifying and settling the legal relations at issue; and (2) whether declaratory relief will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.); *Nationwide Ins. v. Zavalis*, 52 F.3d 689, 692 (7th Cir. 1995) (identifying four factors: (1) whether the issues in the state and federal proceedings are distinct; (2) whether the parties are identical in the state and federal proceedings; (3) whether going forward with the declaratory action will serve a useful purpose in declaring the rights of the parties or amount to merely duplicative and piecemeal litigation; and (4) whether comparable relief is available to the declaratory judgment plaintiff in another forum or another time.).

147. *Dizol*, 133 F.3d at 1225 n.5.

a "res judicata" advantage; or (4) whether the use of a declaratory action will result in entanglement of the parties; and the availability and relative convenience of other remedies.<sup>148</sup>

The United States Supreme Court has recognized that a district court's decision to abstain from jurisdiction cannot rest on a mechanical checklist of the factors. Instead, a court's decision must rest "on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighed in favor of the exercise of jurisdiction."<sup>149</sup> Therefore, in the Ninth Circuit for example, all the relevant factors must be assessed, not simply the three factors delineated in the *Brillhart* decision.<sup>150</sup> However, the Ninth Circuit's recent application of *Brillhart* abstention in *Huth v. Hartford Insurance Company of the Midwest*<sup>151</sup> has significantly expanded abstention while at the same time nullifying the use and effect of the application of the *Brillhart* decision.<sup>152</sup>

## II. *HUTH V. HARTFORD INSURANCE COMPANY OF THE MIDWEST*— THE FINAL PHASE OF IMPLOSION OF FEDERAL JURISDICTION IN DECLARATORY JUDGMENT ACTIONS

### A. *The Initial Step—The District Court Decision*

In *Huth v. Hartford Insurance Company of the Midwest*,<sup>153</sup> the insurance company, Hartford, brought an action pursuant to the FDJA seeking a declaration from the district court that Catt Michele Huth, claiming insured status, was not entitled to underinsured motorist benefits under her mother's policy because she was not a resident of her mother's household.<sup>154</sup> Because of the coverage dispute, Hartford initiated a declaratory judgment action in federal court. One week after Hartford filed its declaratory judgment action under the FDJA, Huth filed an identical action in Arizona state court pursuant to the Arizona Declaratory Judgment Act,<sup>155</sup> claiming that

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148. *Id.* (citing *American States Ins. Co. v. Kearns*, 15 F.3d 142, 145 (9th Cir. 1994) (Garth, J., concurring)).

149. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15–17 (1983). Stated differently, a district court's task "is not to find some substantial reason for the exercise of federal jurisdiction." *Id.* at 25.

150. *See Dizol*, 133 F.3d at 1225 n.5 (citing *Kearns*, 15 F.3d at 145 (Garth, J., concurring)).

151. 298 F.3d 800 (9th Cir. 2002).

152. *See infra*, Part II & III.

153. 298 F.3d 800 (9th Cir. 2002).

154. *Id.* at 802.

155. *See A.R.S. § 12-1832 et. seq.* Unlike the FDJA, Arizona's Declaratory Judgment Act is not discretionary ("any person . . . may have determined any question of construction or



she was entitled to underinsured motorist benefits under the Hartford policy.<sup>156</sup> Hartford subsequently removed the state declaratory judgment action to the Arizona Federal District Court based upon diversity jurisdiction under 28 U.S.C. § 1332.<sup>157</sup> The state and federal actions were then consolidated in federal court.<sup>158</sup>

Huth motioned the court to remand the state portion of the consolidated action and simultaneously motioned the court to stay the federal part of the consolidated action, requesting that the court abstain from exercising jurisdiction under the FDJA.<sup>159</sup> The district court granted both the motion to remand<sup>160</sup> and the motion to stay.<sup>161</sup> While the district court agreed that there was no presumption of abstention in insurance coverage disputes generally,<sup>162</sup> the court held that abstention was appropriate under the court's *Brillhart* analysis.<sup>163</sup>

Addressing the *Brillhart* factors, the district court initially stated that both actions rested upon state law issues exclusively and there were no additional claims attached to either action which would necessitate proceeding in federal court.<sup>164</sup> The court found the forum shopping factor to be neutral because both parties sought different forums to achieve an advantage for their case.<sup>165</sup> Further, the court

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validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.")

156. *Huth*, 298 F.3d at 802.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* Abstention results in either a stay, *see, e.g., Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 30–31 (1959) or dismissal, *see, e.g., Harris County Commissioner's Court v. Moore*, 420 U.S. 77, 88–89 (1975) of the federal actions.

162. *Hartford Insurance Co. of the Midwest v. Huth*, No. 00-2067 & No. 00-2345, slip op. at 3–4 (D. Ariz. April 3, 2001). *See* *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (holding that "there is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically.").

163. *Hartford Insurance Co. of the Midwest v. Huth*, No. 00-2067 & No. 00-2345, slip op. at 4 (D. Ariz. April 3, 2001).

164. *Id.* *See also* *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir. 1991) (stating that in *Brillhart*, "the Court wanted to avoid having federal courts needlessly determine issues of state law."). The Court in *Brillhart* warned that in regards to deciding complex state law issues, "scattered opinions of an intermediate appellate court of a State may convey only doubts and confusion to one inexperienced in the law of that State and yet be entirely clear and consistent when placed in the mosaic of the whole law of that State." *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 497 (1942).

165. *Hartford Insurance Co. of the Midwest v. Huth*, No. 00-2067 & No. 00-2345, slip op. at 4 (D. Ariz. April 3, 2001). *See also* *Chamberlain*, 931 F.2d at 1367 (citing *Brillhart*, 316 U.S. at 495 (stating that the forum shopping factor arose out of "a concern that parties could attempt to avoid state court proceedings by filing declaratory relief actions in federal court" and that "[t]his kind of forum shopping could be avoided by requiring district courts to inquire into the availability of state court proceedings to resolve all issues without federal intervention.")).

held that the duplicative litigation factor was also neutral because, irrespective of whether the case was remanded or the district court decided to exercise its jurisdiction, all of the issues would be resolved in either forum.<sup>166</sup> Accordingly, the court held that because the sole issue in the case rested exclusively on state law and there was no other basis for federal jurisdiction present, the state forum was more appropriate than the federal forum where all other factors are neutral.<sup>167</sup>

### B. *One Giant Leap—The Ninth Circuit Appeal*

Hartford appealed the decision<sup>168</sup> of the district court to the United States Court of Appeals for the Ninth Circuit, asserting that the district court had abused its discretion by remanding the state court action and staying the federal court action.<sup>169</sup> Hartford asserted that the court improperly applied the *Brillhart* abstention doctrine because there was no pending parallel state action in light of Hartford's removal of the state action to federal court.<sup>170</sup>

The Ninth Circuit disagreed and upheld the ruling of the district court.<sup>171</sup> First, the Ninth Circuit rejected Hartford's assertion that the lack of a pending parallel state action affected the district court's ability to exercise discretion under the *Brillhart* factors.<sup>172</sup> The existence of a pending parallel state action was only one part of the balancing test to be applied by district courts in determining whether to exercise jurisdiction under *Brillhart*.<sup>173</sup> Despite recognizing the

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166. *Id.* Hartford Insurance Co. of the Midwest v. Huth, No. 00-2067 & No. 00-2345, slip op. at 4 (D. Ariz. April 3, 2001). See also *Chamberlain*, 931 F.2d at 1367 (citing *Brillhart*, 316 U.S. at 495 (observing that in *Brillhart*, "the Court no doubt wanted to avoid duplicitous litigation. As the Court noted, '[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.'")).

167. Hartford Insurance Co. of the Midwest v. Huth, No. 00-2067 & No. 00-2345, slip op. at 3-4 (D. Ariz. April 3, 2001).

168. Orders denying remand are interlocutory in nature and, thus, are not reviewable except as part of an appeal from final judgment. See *Cervantez v. Bexar County Civil Serv. Comm'n*, 99 F.3d 730, 732 (5th Cir. 1996) (reviewing denial of remand as part of review of final judgment).

"An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise . . ." 28 U.S.C. § 1447(d) (1994). Appellate review is limited to remand based on the two grounds enumerated in § 1447(c). See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1975) ("section 1447(d) must be read in *pari materia* with section 1447(c)").

169. *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800, 803-04 (9th Cir. 2002).

170. *Id.* at 802.

171. *Id.* at 804.

172. *Id.* at 802-03.

173. *Id.* (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995) ("We believe it more consistent with the statute to vest district courts with discretion in the first instance, because

existence of a pending parallel state action to be a factor in the case, the court did not address whether this factor had been adequately considered by the district court in its *Brillhart* analysis and instead solely considered the district court's application of those factors that were considered in the lower court's decision.<sup>174</sup> The court also rejected Hartford's argument that the "exceptional circumstances" test outlined in *Colorado River* applied.<sup>175</sup> Instead, the court found that the *Brillhart* analysis affirmed in *Wilton* was the applicable abstention standard.<sup>176</sup>

In analyzing the court's application of the three factors enumerated in *Brillhart*, the court observed that the "avoiding duplicative litigation, factor was neutral in its application . . . as [the case would] be disposed of entirely in either the state or federal forums."<sup>177</sup> Additionally, the court agreed that the "avoiding forum

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facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp.")).

However, the doctrine of pendent jurisdiction allows federal courts to hear state law claims brought jointly with a federal claim in federal court wherein a case is removed to federal court, even though the state law claims could not have been brought separately in federal court because by themselves they do not have an independent basis in federal jurisdiction. See Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34; Arthur R. Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1 (1985); Note, *Problems with Judicial Power and Discretion in Federal Pendent Jurisdiction Cases*, 7 WM. MITCHELL L. REV. 689 (1981). The state law claims must be closely related to the action which is within the court's statutory jurisdiction. In *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966), the Supreme Court constructed a two prong test for pendent jurisdiction. First, "power" exists to hear the state claim brought with the federal claim if both claims derive from a "common nucleus of operative facts" and the "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." *Id.* at 725. This power need not be exercised in every case because "[i]ts justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims." *Id.* at 726. An intermediate part of the test was added after *Gibbs* which requires the court to determine whether the exercise of jurisdiction would violate a particular federal policy or whether it is an attempt by plaintiff to manufacture federal jurisdiction when it is otherwise foreclosed by statute. *Ambromovach v. United Mine Workers*, 726 F.2d 972, 989-90 (3rd Cir. 1984). Both pendent and ancillary jurisdiction are judicial doctrines that permit a Federal Court to exercise jurisdiction over a party or claim normally not within the scope of federal judicial power. Comment, Bradford Gram Swing, *Federal Common Law Power to Remand a Properly Removed Case*, 136 U.P.A. L. REV. 583, 584 n.9 (1987). Pendent jurisdiction concerns the resolution of a plaintiff's federal and state law claims against a single defendant in one action. *Owen Equipment Co. v. Kroger*, 437 U.S. 365, 370 (1987). Ancillary jurisdiction, on the other hand, typically involves claims by a defending party hauled into court against his will, or by another person whose rights might be irretrievably lost unless he can assert them in an ongoing action in a federal court. *Id.* at 376. Ancillary jurisdiction often arises in the context of counterclaims, cross-claims, third-party claims and interpleaders.

174. *Huth*, 298 F.3d at 802-03.

175. *Id.* at 804.

176. *Id.*

177. *Id.* at 803-04.

shopping" factor was neutral in its application due to the fact that both parties simply sought to have the case litigated in a forum that they believed to be more advantageous.<sup>178</sup> Turning to the "needless determination of state law" factor, which was the basis of the district court decision, the court admitted that there was "no great need for state resolution."<sup>179</sup> Nevertheless, the court held that the district court did not abuse its discretion by declining to exercise its jurisdiction over the case because there was no presumption in favor of retaining jurisdiction, essentially finding that the "needless determination" factor was neutral as well.<sup>180</sup>

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178. *Id.* at 804. The term "forum shopping" typically refers to a party's act of seeking the most advantageous venue in which to try a particular case. See Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 14 (attempting to have a case heard in a forum where it has the greatest chance of success is commonly defined as "forum shopping"); Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 UNIV. MIAMI L. REV. 267, 268 (1996) (when a party attempts to have its action tried in a particular court or jurisdiction where the most favorable judgment or verdict may be rendered is "forum shopping"). Although "forum shopping" has a pejorative connotation, various courts have recognized the place of forum shopping as part of a potentially sound litigation strategy. See, e.g., *Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987) ("there is nothing inherently evil about forum shopping"), *cert. denied*, 487 U.S. 1218 (1988). The court in *Celotex* called forum shopping a "sector . . . strawman depending on whose ox is being gored." *Id.* at 512. Indeed, Justice Rehnquist in *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770, 779 (1984), provided that the Court approvingly refers to the forum shopping strategy calling it "no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules for sympathetic, local populations." *Id.* See generally Douglas G. Baird, *Loss Distribution, Forum Shopping and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 825-26 (1987) (recognizing that once two different courts are available in which to litigate disputes, there is an incentive to forum shop). Indeed, selecting a forum is part of the social fabric. See, e.g., Michael Bradley & Cindy A. Schipani, *The Relevancy of the Duty of Care Standard and Corporate Governance*, 75 IOWA L. REV. 1, 65 (1990) (documenting the reincorporation of many firms in Delaware to seek the protection of a new statute limiting directors' liability). Convenience of counsel may be a strong motivator in the choice of forums. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 400 (1992).

Commentators have written about the abuse of forum shopping. See Kevin M. Clermont & Theodore Isenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507, 1508 n.1 (1995) (the authors discuss examples of plaintiffs seeking venues in certain south Texas counties where judges are sympathetic and juries are generous). See also *Coast Manufacturing Co. v. Caeylon*, 600 F.Supp 696 (S.D. N.Y. 1985) where the court refused Rule 11 sanctions against plaintiff's forum shopping efforts: "[I]t is understandable that litigants will do a small amount of artful conniving to gain access to the diversity jurisdiction of the federal courts, and for a long time such efforts have been tolerated. It is our duty to protect the diversity jurisdiction from abuses of the sort attempted here. In doing so, we need not become punitive." *Id.* at 698.

179. *Huth*, 298 F.3d at 804.

180. *Id.*

### III. WHERE THE *HUTH* DECISION TAKES US—UNDERSTANDING THE EXPANSIVE NATURE OF THE NINTH CIRCUIT'S DECISION AND ITS POSSIBLE EFFECTS

The *Huth* decision greatly expanded the abstention doctrine as it relates not only to the FDJA but also declaratory judgment actions in general.<sup>181</sup> By affirming the decision of the district court, the Ninth Circuit sanctioned the lower court's procedural maneuver in which the district court first remanded the state court action based upon the *Brillhart* abstention doctrine, and then proceeded, based upon the same doctrine, to abstain from hearing the federal action asserting that the claim would be better resolved in the post-remand "pending" state action.<sup>182</sup> Accordingly, this decision has significant implications on the federal court's exercise of jurisdiction under the FDJA and also the ability of a party to seek resolution in the federal courts.

#### A. *Remand in Relation to Federal Declaratory Judgment Act Discretion*

The first issue addressed by the Ninth Circuit Court of Appeals was whether the District Court erred in remanding the Arizona declaratory judgment action to Arizona state courts.<sup>183</sup> Once a case is removed, only limited circumstances will support remand.<sup>184</sup>

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181. See *infra*. Part III.

182. See *Huth*, 298 F.3d 800.

183. *Huth*, 298 F.3d at 802.

184. See 28 U.S.C. § 1447(c) (1994). A plaintiff may seek remand back to state court of an improperly removed action. *Id.* A case may be remanded for procedural or jurisdictional defects. If the removal defect is based on a procedural error, plaintiff has thirty days from the filing of the removal notice to file a notice of remand. If this is not done, the procedural defect is waived. See *Maniar v. FDIC*, 979 F.2d 782, 784 (9th Cir. 1992); *FDIC v. Loyd*, 955 F.2d 316, 327 (5th Cir. 1992). However, the courts are split over whether the district court may remand *sua sponte* on the basis of a procedural defect. Compare *Page v. City of South Field*, 45 F.3d 128 (6th Cir. 1995) with *In Re Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994). Removal defects based on lack of subject matter jurisdiction may be raised at any time and the court may even act *sua sponte* to remand the case. 28 U.S.C. § 1447 (1994). If a procedural or jurisdictional defect renders removal improper, the courts have no discretion but to remand. *Id.* However, some courts have created a practical exception to this rule, allowing the removing party to correct a procedural defect within thirty days following removal. See *O'Halloran v. University of Washington*, 856 F.2d 1375 (9th Cir. 1988); *Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1995); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980); *Computer People, Inc. v. Computer Dimensions Int'l*, 638 F. Supp 1293 (M.D. La. 1986). This statute provides:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Typically, under 28 U.S.C. § 1447(c), only a lack of subject matter jurisdiction or a defect in the removal procedures employed will suffice.<sup>185</sup> Therefore, "if jurisdiction exists and was properly invoked, the Court has no discretion to remand."<sup>186</sup>

An examination of the facts in *Huth* reveals that neither lack of subject matter jurisdiction nor a defect in removal procedures was present.<sup>187</sup> There was complete diversity of citizenship between the parties and the removal procedure was never challenged.<sup>188</sup> Relying upon *Brillhart*, Huth argued for a remand of the state portion of the action and requested that the district court abstain from hearing the federal portion of the action because the issues in the case were better left to the state court to resolve.<sup>189</sup> Because this was the position accepted by the district court and ultimately the Ninth Circuit, the Arizona declaratory judgment action was remanded to state court via the abstention doctrine, exercised pursuant to the discretion granted under the FDJA.<sup>190</sup>

### 1. FDJA Discretion in Non-FDJA Actions?

Based upon the fact that *Brillhart* was the means by which the state part of the action was remanded, the Ninth Circuit's decision to

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28 U.S.C. § 1447(c) (1994).

185. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345 (1976) (noting that the district court exceeded its authority "in remanding on grounds not permitted by the controlling statute [28 U.S.C. § 1447(c)]." See also *Jamison v. Wiley*, 14 F.3d 222, 239 (4th Cir. 1994) (holding that under 28 U.S.C. § 1447(c), remand of a properly removed case is permitted only where there is a defect in removal procedure or a lack of federal subject matter jurisdiction present); *Levy v. Weissman*, 671 F.2d 766, 769 (3rd Cir. 1982) (no discretion to remand as a sanction); *Ryan v. State Bd. of Elections*, 661 F.2d 1130, 1135 (7th Cir. 1981) (no discretion to remand as a form of abstention); *In re Shell Oil. Co.*, 631 F.2d 1156, 1157-58 (5th Cir. 1980) (no discretion to remand for failure to oppose motion to remand); *Buchner v. F.D.I.C.*, 981 F.2d 816, 819 (5th Cir. 1993); *Huber v. Greyhound Lines, Inc.*, 926 F. Supp. 821, 822 (E.D. Wis. 1996); *Atchley v. Heritage Cable Vision Assocs.*, 904 F. Supp. 870, 873 (N.D. Ind. 1995); *Burnette v. Godshall*, 828 F. Supp. 1439, 1444 (N.D. Cal. 1993), *aff'd sub nom.*, *Burnette v. Lockheed Missiles & Space Company, Inc.*, 72 F.3d 766 (9th Cir. 1995); *Begley v. Maho Bay Camps, Inc.*, 850 F. Supp. 172, 175 (E.D.N.Y. 1994); *Rosciti Constr., Inc. v. Lot 10 of the East Greenwich Town Assessor's Plat 14*, 754 F. Supp. 14, 16 (D. R.I. 1991).

186. *Burnette*, 828 F. Supp. at 1444. See also *Davis v. Joyner*, 240 F. Supp. 689 (E.D.N.C. 1964) (observing that "where Congress has provided both a state and a federal forum, and has further provided for actions first brought in the state court to be removed to the federal court, no discretionary power exists to remand the case to state court.") (citation omitted).

187. See *Huth*, 298 F.3d 800.

188. See *Hartford Insurance Co. of the Midwest v. Huth*, No. 00-2067 & No. 00-2345, slip op. at 3-4 (D. Ariz. April 3, 2001); *Huth*, 298 F.3d at 802.

189. *Huth*, 298 F.3d at 802. However, it should be noted that Huth did not contend that this was a difficult issue of state law and the Ninth Circuit recognized that there was "no great need for state court resolution." *Id.* at 804.

190. See *id.*

affirm the remand of the action generally runs contrary to the reasoning of the Supreme Court.<sup>191</sup> As was previously noted, in *Colorado River Water Conservation District v. United States*,<sup>192</sup> the United States Supreme Court observed:

Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."<sup>193</sup>

The Supreme Court further noted that the "virtual unflagging duty" of the district courts is to exercise federal jurisdiction when it exists.<sup>194</sup> Although the Court in *Colorado River* ultimately allowed abstention, it did so only because of "exceptional circumstances."<sup>195</sup> In *Quackenbush v. Allstate Insurance Company*,<sup>196</sup> the Supreme Court stated that although abstention was traditionally applied only to cases where the court has been asked to employ its historical equitable powers, this has been extended to include cases in which the court has discretion to grant or deny relief, including injunctive relief and "certain classes" of declaratory judgments.<sup>197</sup> Therefore, according to the Supreme Court, declaratory judgment actions are not subject to the abstention doctrine generally, only under certain circumstances.<sup>198</sup>

Variations of the abstention doctrine, including *Younger* abstention, *Burford* abstention, and generally the "exceptional circumstances" described in *Colorado River*, have been applied to declaratory judgment actions.<sup>199</sup> However, abstention pursuant to the

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191. See *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). The *Wilton* Court stated that the Federal Declaratory Judgment Act was unique in the discretion it provided to the courts. The Court observed:

Distinct features of the Declaratory Judgment Act, we believe, justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the "exceptional circumstances" test of *Colorado River* and *Moses H. Cone*. No subsequent case, in our view, has called into question the application of the *Brillhart* standard to the *Brillhart* facts.

*Wilton*, 515 U.S. at 286.

192. 424 U.S. 800 (1976).

193. *Id.* at 813 (quoting *County of Allegheny v. Frank Machuda Co.*, 360 U.S.185 (1959)).

194. *Id.* at 817.

195. *Id.* at 819–20.

196. 517 U.S. 706 (1996).

197. *Id.* at 718.

198. See *id.* The *Quackenbush* Court differentiated declaratory judgment actions from the traditional powers of abstention rising in equity. *Id.*

199. See *id.* at 716–18.

*Brillhart* test applies only to actions brought under the FDJA.<sup>200</sup> The Supreme Court has recognized that other types of declaratory judgment actions, not brought under the FDJA, are not subject to the same unique discretion that arises pursuant to the language of the FDJA.<sup>201</sup> As was discussed by the Ninth Circuit in *Transamerica Occidental Life Insurance Company v. Digregorio*,<sup>202</sup> “*Colorado River* itself involved a complaint for declaratory relief.”<sup>203</sup> However, the *Digregorio* court went on to state:

Whatever the proper determination, it is at least clear that the *Colorado River* Court did not consider that case to be a [Federal] Declaratory Judgment Act suit. Otherwise the four dissenters in [*Will v.*] *Calvert* [*Fire Insurance Company*] (all of whom were members of the six-justice *Colorado River* majority) would not have distinguished the “discretionary” federal jurisdiction over declaratory judgment suits from the “non-discretionary” federal jurisdiction to which *Colorado River* applies.<sup>204</sup>

The Supreme Court has agreed that although a declaratory judgment action, *Colorado River* was not an action brought pursuant to the FDJA.<sup>205</sup>

The reasoning of the Ninth Circuit ignores a significant fact in the *Huth* case.<sup>206</sup> The portion of the case remanded to the state court by the District Court in *Huth* was not based upon the FDJA; instead, it was based upon the Arizona Declaratory Judgment Act.<sup>207</sup> The

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200. See *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). The *Wilton* Court observed: Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. On its face, the statute provides that a court “may declare the rights and other legal relations of any interested party seeking such declaration,” . . . .

*Id.* See also *id.* at 282 (stating that “*Brillhart* makes clear that district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites.”).

201. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995) (stating that “[n]either *Colorado River*, which upheld the dismissal of federal proceedings, nor *Moses H. Cone*, which did not, dealt with actions brought under the Declaratory Judgment Act”).

202. 811 F.2d 1249 (9th Cir. 1987).

203. *Id.* at 1254 n.4 (citations omitted).

204. *Id.* (citations omitted).

205. See *Wilton*, 515 U.S. at 286.

206. Examination of both the Order of the district court and the Ninth Circuit opinion reveals that in neither case did the court consider the fact that the portion of the case being remanded was an action based upon the state declaratory judgment act and no assessment was made of that statute to determine if that statute conferred the same unique discretion granted to federal courts under the Federal Declaratory Judgment Act. See generally *Hartford Ins. Co. of the Midwest v. Huth*, No. 00-2067 & No. 00-2345, slip op. at 3-4 (D. Ariz. April 3, 2001); *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800 (9th Cir. 2002).

207. See *id.*



Ninth Circuit's holding in *Huth* is therefore contradictory to the basis of the discretion the district courts have under the FDJA.<sup>208</sup> As has been discussed, the reason the abstention doctrine has been held to apply to actions brought pursuant to the FDJA is that the empowering statute grants the judiciary discretion to hear such actions.<sup>209</sup> The Arizona Declaratory Judgment Act, as opposed to the FDJA, is a pure grant of jurisdiction by the state legislature, not a grant of discretionary jurisdiction.<sup>210</sup> The only discretion given to the courts under the Arizona Declaratory Judgment Act exists where "such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."<sup>211</sup>

Pursuant to *Huth*, the Ninth Circuit has thus expanded *Brillhart* abstention to apply to state-originating declaratory judgment actions that have been removed.<sup>212</sup> At least one other federal court has previously rejected this approach.<sup>213</sup> This case law would indicate that a district court cannot apply the abstention doctrine to remand a state declaratory judgment action which has been properly removed to federal court.<sup>214</sup>

Under these circumstances, the reasoning must therefore be that a district court will somehow acquire the same discretion over a state declaratory judgment action that it had over the federal declaratory judgment action so that it can implement the same standard of discretion as is given pursuant to the language of the federal act. However, it is well-settled that removal does not change the legal basis of a removed action from state law to that of comparable federal law.<sup>215</sup> A case that is removed to federal court based upon diversity jurisdiction, even where consolidated with a federal action, is still a

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208. See *supra* note 121 and accompanying text.

209. *Id.*

210. Compare 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.") and A.R.S. § 12-1831 ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.") with 28 U.S.C. § 2201 ("In a case of actual controversy within its jurisdiction, . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.").

211. A.R.S. § 12-1836.

212. See generally *Huth*, 298 F.3d 800.

213. See *Allstate Ins. Co. v. Longwell*, 735 F. Supp. 1187, 1190-92 (S.D.N.Y. 1990) (holding that the abstention doctrine could not be used to remand a properly removed state declaratory judgment action back to state court).

214. See *id.*

215. See, e.g., *Knapp v. N. Am. Rockwell Corp.*, 506 F.2d 361, 364 (3d Cir. 1974); *Carson v. Nat'l Bank of Commerce Trust & Sav.*, 501 F.2d 1082, 1083 (8th Cir. 1974); *Strachan v. Nisbet*, 202 F.2d 216, 218 (7th Cir. 1953).

distinct action based on state law and governed by state law, which, in the *Huth* case, was the Arizona Declaratory Judgment Act.<sup>216</sup> What the Arizona District Court and Ninth Circuit clearly disregarded was the fact that the action must fall under the FDJA in order to have FDJA discretion over it.<sup>217</sup> Because the *Huth* case involved an action brought under state law and removed pursuant to diversity, the state law in relation to the Arizona Declaratory Judgment Act should have applied.<sup>218</sup>

Further, the application of the *Brillhart* abstention doctrine to the *Huth* case would appear to expressly cut against the purpose of the abstention doctrine generally. As was previously stated, abstention is a narrow doctrine and is only applied where an exception has been carved out.<sup>219</sup> Up until the *Huth* decision rendered by the Ninth Circuit, there was no exception that had been delineated by any court which would have any application to the state-based portion of the *Huth* case.

Speaking to the abstention doctrine generally, the Supreme Court in *Colorado River* stated that abstention "was never a doctrine of equity that a federal court should exercise its discretion to dismiss a suit merely because a state court could entertain it."<sup>220</sup> In remanding the Arizona Declaratory Judgment Action by using Federal Declaratory Judgment Act discretion, the *Huth* decision resulted in the very thing the Supreme Court has said abstention was not designed for—exercise of discretion merely because a state could entertain it.<sup>221</sup>

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216. See *Torre v. Brickey*, 278 F.3d 917, 919 (9th Cir. 2002) (stating that state law applies in diversity actions); *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1527 (10th Cir. 1995) (holding that where jurisdiction is based upon diversity, the law of the forum state applies).

217. See *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995).

218. See *Torre*, 278 F.3d at 919; *Quaker State Minit-Lube*, 52 F.3d at 1527; *Knapp*, 506 F.2d at 364; *Carson*, 501 F.2d at 1083; *Strachan*, 202 F.2d at 218.

219. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (stating that "federal courts may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an important countervailing interest, . . . , for example, where abstention is warranted by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration'" (citations omitted)).

220. *Colorado River*, 424 U.S. at 813-14.

221. See *id.* See also *Huth*, 298 F.3d at 804 (recognizing that while the district court held that the state court was the preferable forum, there was admittedly "no great need for state court resolution" in that case).

## 2. The Incredible Shrinking Pending and Parallel State Action Element

The *Huth* decision also significantly expands the abstention doctrine in a manner contrary to the limiting principle expressed in *Colorado River* by extending the *Brillhart* reasoning to declaratory judgment actions in which there is no pending parallel state action.<sup>222</sup> The District Court in *Huth* found that despite the fact that the Arizona declaratory judgment action had been properly removed to federal court, that action still was a “pending” state action and could thus be remanded pursuant to the court’s discretion under the FDJA.<sup>223</sup> The Ninth Circuit affirmed this decision.<sup>224</sup>

The district court explained its reasoning in a footnote in its order.<sup>225</sup> The court observed:

Hartford argues that there is no state court action as it has been removed to federal court. The Court does not find this argument persuasive. Clearly [the original state action] began in state court. Once this court decides to remand the action the case will proceed in state court rather than federal court. Hartford cannot avoid the Court’s jurisdictional discretion under the FDJA by removing a state court action and then arguing no state court action exists.<sup>226</sup>

The irony in this argument is that the logical fallacy of which the district court accused Hartford is exactly the reasoning the district court employs to remand the original state action. The district court remanded the original state action based upon *Brillhart* discretion that exists only where there is a pending parallel state court action.<sup>227</sup> Accordingly, the court first had to remand in order to gain the discretion that it exercised when remanding the case. To use the court’s reasoning, the court cannot exercise its discretion under the FDJA by remanding a case and then arguing that a pending parallel state action exists which gives it the right to exercise such discretion.

The holding in *Huth* on this issue contradicts the decisions of at least two other circuits, an earlier decision from the Ninth Circuit

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222. Compare *Huth*, 298 F.3d at 804 with *Colorado River*, 424 U.S. at 813–14.

223. *Hartford Ins. Co. of the Midwest v. Huth*, No. 00-2067 & No. 00-2345, slip op. at 4 (D. Ariz. April 3, 2001).

224. See *Huth*, 298 F.3d 800.

225. *Hartford Ins. Co. of the Midwest v. Huth*, No. 00-2067 & No. 00-2345, slip op. at 4 n.4 (D. Ariz. April 3, 2001).

226. *Id.*

227. See *Wilton*, 515 U.S. at 289–90.

itself, and other decisions of the United States Supreme Court.<sup>228</sup> First, in a previous published and still valid decision, the Ninth Circuit held that a state action that has been properly removed to federal court is not a pending state action. In *Kirkbride v. Continental Casualty Company*,<sup>229</sup> the subject case had been removed in its entirety to federal court.<sup>230</sup> The district court remanded the declaratory judgment action to state court based upon the abstention doctrine.<sup>231</sup> The Ninth Circuit reversed the decision of the district court.<sup>232</sup> The court observed that "[t]he [abstention] doctrine is 'available only in situations involving the *contemporaneous* exercise of concurrent jurisdictions, either by the federal courts or by the state and federal courts.'"<sup>233</sup> Accordingly, the *Kirkbride* court held that the abstention doctrine was not applicable because the entire case had been removed to federal court and thus "there was no concurrent or pending state court proceeding when" the motion for remand was made.<sup>234</sup>

Other jurisdictions agree with the holding of the Ninth Circuit in *Kirkbride*. The court in *Piekarski v. Home Owners Savings Bank*,<sup>235</sup> found that the abstention doctrine was inapplicable because there was only "one case, which originally was in state court, but now has been properly removed to federal court."<sup>236</sup> Further, the Southern District of New York, in *Allstate Insurance Company v. Longwell*,<sup>237</sup> addressed a factual scenario almost identical to the issues presented in *Huth*.<sup>238</sup> To resolve a coverage dispute, the insurer in that case filed a declaratory judgment action in federal court.<sup>239</sup> The insured then filed a

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228. See *Colorado River*, 424 U.S. 800; *Kirkbride v. Continental Cas. Ins. Co.*, 933 F.2d 729 (9th Cir. 1991); *Piekarski v. Home Owners Sav. Bank*, 743 F. Supp. 38 (D.D.C. 1990); *Allstate Ins. Co. v. Longwell*, 735 F. Supp. 1187 (S.D.N.Y. 1990).

229. 933 F.2d 729 (9th Cir. 1991).

230. *Id.* at 731.

231. *Id.*

232. *Id.* at 735.

233. *Id.* at 734. (quoting *F.D.I.C. v. Nichols*, 885 F.2d 633, 638 (9th Cir. 1989) (emphasis in original)).

234. *Id.* See also *Int'l Bhd. of Elec. Workers Local 1357 v. Am. Int'l Adjustment Co., Inc.*, 955 F. Supp. 1218, 1219 n.1 (D. Haw. 1997) (observing that there was no pending state action where the state action had been properly removed).

235. 743 F.Supp. 38.

236. *Id.* at 42. See also *Dittmer v. County of Suffolk*, 146 F.3d 113, 117-18 (2d Cir. 1998) (recognizing that abstention could only be applied where there was the contemporaneous exercise of concurrent jurisdiction, which would not include where a case had been removed to federal court).

237. 735 F. Supp. 1187.

238. In both the *Huth* case and the *Longwell* case, the insurer first filed a declaratory judgment action in state court which was subsequently followed by the insured filing a virtually identical state court action. The insurers both then removed the state court action to federal court.

239. *Id.* at 1189.

responsive declaratory judgment action in state court.<sup>240</sup> The insurer subsequently removed the state action to federal court based upon diversity jurisdiction.<sup>241</sup> The insured moved to remand the state action back to state court.<sup>242</sup>

The court in *Longwell* first rejected the argument that the abstention doctrine defined in *Burford* applied because the declaratory judgment action involved only the application of contract principles and did not interfere with specialized ongoing state regulatory schemes.<sup>243</sup> More significantly, the court held the argument that the abstention doctrine as pronounced in *Colorado River* did not apply under those circumstances.<sup>244</sup> The court stated that the doctrine given in *Colorado River* is “predicated on the existence of pending state litigation on parallel issues, and, thus, are inapposite since there is no longer anything pending in the state courts—both lawsuits are now here.”<sup>245</sup>

Essentially, these cases all support the conclusion that the *Huth* decision is in direct contravention of the Supreme Court’s holding in *Colorado River*.<sup>246</sup> Simply stated, a state action that is in federal court cannot be in state court at the same time.<sup>247</sup> While the action may still be based on state law, the action, upon removal, is “pending” in federal court.<sup>248</sup> The effect of the decision of the district court and the

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240. *Id.* at 1189–90.

241. *Id.* at 1190.

242. *Id.*

243. *Id.* at 1191.

244. *Id.* at 1191–92.

245. *Id.* at 1192.

246. The Court in *Colorado River* recognized that even where there were pending parallel state proceedings, the circumstances warranting the exercise of abstention was extremely limited. 424 U.S. at 817–18 (1976). The Court observed:

Generally, as between state and federal courts, the rule is that “the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . .” As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them. Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention.

*Id.* (citations omitted).

247. See *Kirkbride v. Continental Cas. Ins. Co.*, 933 F.2d 729, 734 (9th Cir. 1991); *Piekarski v. Home Owners Savings Bank*, 743 F. Supp. 38 (D.D.C. 1990); *Allstate Ins. Co. v. Longwell*, 735 F. Supp. 1187 (S.D.N.Y. 1990).

248. “Pending” has been defined as “[a]waiting an occurrence or conclusion of action, period of continuance or indeterminacy. Thus, an action or suit is ‘pending’ from its inception

Ninth Circuit in the *Huth* case is that every diversity case becomes discretionary—even though a case has been removed to federal court, it remains a “pending” state action. Under this reasoning, a court can always remand a removed diversity action under abstention principles. The Supreme Court has unequivocally rejected this conclusion.<sup>249</sup>

In the vein of *Colorado River*, the holding in *Brillhart* only applies where there are parallel state proceedings.<sup>250</sup> Thus, in a like manner, application of the abstention doctrine has been rejected when there are no pending parallel state proceedings.<sup>251</sup> *Brillhart* abstention, as was shown in Part III.A.1. above, also only applies to the FDJA.<sup>252</sup> Accordingly, in *Kirkbride*, the court specifically rejected the argument that the district court’s abstention was supported by the “broader discretion afforded to trial courts to decline to exercise jurisdiction under the [Federal] Declaratory Judgment Act,” simply because a state declaratory judgment action was removed to federal court.<sup>253</sup> Thus, the *Huth* decision deviates from prior decisions of other federal jurisdictions and in the Ninth Circuit itself and extends the doctrine’s application to enable a district court to remand a case which has been properly removed.

#### *B. Determining the Governing Discretionary Standard for the Federal Declaratory Judgment Action When There Are No Parallel State Proceedings*

In *Wilton*, the Supreme Court concluded its decision by stating “[w]e do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example, cases raising issues of federal law or cases in which there are no parallel state proceedings.”<sup>254</sup> Both *Brillhart* and *Wilton* addressed only a situation in which a federal

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until the rendition of final judgment.” BLACK’S LAW DICTIONARY 1134 (6th ed. 1990). Accordingly, upon removal, a case is “awaiting” its conclusion in federal court.

249. See *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 356 (1988) (stating that diversity jurisdiction is not discretionary). See also *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 553–54 (1946) (holding that “[t]he diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts.”) (quoting *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943)).

250. See *Wilton*, 515 U.S. at 286.

251. See *Kirkbride*, 933 F.2d at 734–35 (holding that while it was the long-standing rule for the Ninth Circuit to allow the district court discretion over actions brought under the FDJA, the rule did not apply in this case because this was not a federal declaratory action but was rather a removed action from state court).

252. See *supra* Part III.A.1. and accompanying notes.

253. *Kirkbride*, 933 F.2d at 734–35.

254. *Wilton*, 515 U.S. at 290 (emphasis added).

declaratory judgment action is brought at the same time a parallel state proceeding is pending.<sup>255</sup> The diverse and contradictory opinions that result from the lack of guidance by the Supreme Court on the issue of what, if any, discretion the district court has over a federal declaratory judgment action under such circumstances, is illustrated and exemplified by the *Huth* decision. In *Huth*, the district court and the Ninth Circuit provided an answer to the question left open by *Wilton*. Both the district court and the Ninth Circuit in *Huth* applied the *Brillhart* analysis in that case.<sup>256</sup> Indeed, the Ninth Circuit panel went so far as to state that the absence of a pending state action is simply one of the "balancing factors the district court must weigh" as articulated in *Brillhart*.<sup>257</sup>

As was shown in Part III.A.2., in other jurisdictions, as well as in the Ninth Circuit itself, courts have agreed that there is no pending state proceeding when a state case has been entirely removed to federal court.<sup>258</sup> Likewise, many other jurisdictions, as well as the Ninth Circuit, have all held that the *Brillhart* abstention principles will not apply where there is no parallel state proceeding.<sup>259</sup> These holdings are consistent with the fact that the Supreme Court has observed that under *Brillhart* "district courts have substantial latitude in deciding whether to stay or to dismiss a declaratory judgment suit in light of pending state proceedings."<sup>260</sup> The existence of a pending state proceeding is a prerequisite to applying the *Brillhart* analysis under the Supreme Court's prior decisions.<sup>261</sup>

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255. See generally *Brillhart*, 316 U.S. 491; *Wilton*, 515 U.S. 277.

256. *Huth*, 298 F.3d 800.

257. *Id.* at 802-03.

258. See *Kirkbride v. Continental Cas. Co.*, 933 F.2d 729, 734 (9th Cir. 1991); *Int'l Bhd of Elect. Workers Local 1357 v. American Int'l Adjustment Co., Inc.*, 955 F. Supp. 1218, 1219 n.1 (D. Haw. 1997); *Piekarski v. Home Owners Savings Bank*, 743 F. Supp. 38, 42 (D.D.C. 1990); *Dittmer v. County of Suffolk*, 146 F.3d 113, 117-18 (2d Cir. 1998); *Allstate Ins. Co. v. Longwell*, 735 F. Supp. 1187, 1192 (S.D.N.Y. 1990).

259. See *Kirkbride*, 933 F.2d at 734-35 (rejecting the argument that the broader discretion to abstain did not apply in a case where there was no parallel state proceeding because the state action had been removed to federal court); *Jefferson Ins. Co. of N.Y. v. Lopez*, 2000 WL 33179290 (E.D. Cal. 2000) (holding that where there are no parallel state proceedings, the *Brillhart* abstention doctrine does not apply) (citing *Maryland Cas. Co. v. Knight*, 96 F.3d 1284 (9th Cir. 1996)); *Jafee v. Society of N.Y. Hospital*, 1997 WL 685347 (S.D.N.Y. 1997) (refusing to apply the *Brillhart* abstention doctrine where there are no parallel state proceedings).

260. *Wilton*, 515 U.S. at 286 (emphasis added).

261. See *id.* at 289-90.

Some federal courts have reached similar holdings to the *Huth* case.<sup>262</sup> For example, in *Aetna Casualty & Surety Company v. Ind-Com Electric Company*,<sup>263</sup> the Fourth Circuit held:

There is no requirement that a parallel proceeding be pending in state court before a federal court should decline to exercise jurisdiction over a declaratory judgment action. Rather, as the district court stated, "[t]he existence or nonexistence of a state court action is simply one consideration relevant to whether to grant declaratory relief." To hold otherwise would in effect create a per se rule *requiring* a district court to entertain a declaratory judgment action when no state court proceeding is pending. Such a rule would be inconsistent with our long-standing belief that district courts should be afforded great latitude in determining whether to grant or deny declaratory relief.<sup>264</sup>

The basis of the reasoning of the Fourth Circuit reflects the breadth to which the courts are taking the application of *Brillhart* abstention. Essentially, rather than seeing the need to exercise their "virtually unflagging obligation," the courts in *Huth* and *Ind-Com* are finding a way to avoid the exercise of such discretion in all circumstances.

### C. Reason in the "Balance"—Abstention Despite Neutral *Brillhart* Factors

As has been reiterated, it is recognized that the district courts have been granted discretion in entertaining actions under the FDJA.<sup>265</sup> However, this discretion is to be guided by the principles outlined in *Brillhart*.<sup>266</sup> While the *Brillhart* court did not set forth an exclusive set of factors to be used for applying abstention to a federal declaratory judgment action, the Ninth Circuit has derived three primary factors from the *Brillhart* decision the district court is to avoid: (1) needless determination of state law issues; (2) declaratory

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262. See, e.g., *Aetna Cas. & Surety Co. v. Ind-Com Elec. Co.*, 139 F.3d 419 (4th Cir. 1998); *Bd. of County Comm'rs of the County of Marshall v. Continental Western Ins. Co.*, 184 F. Supp. 2d 1117 (D. Kan. 2001).

263. 139 F.3d 419 (4th Cir. 1998).

264. *Id.* at 423 (citations omitted).

265. See *Wilton*, 515 U.S. at 286 (stating that "[s]ince its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.").

266. See *id.* at 289–90.



actions filed as a means of forum shopping; and, (3) duplicative litigation.<sup>267</sup>

In the *Huth* decision, the Ninth Circuit agreed with the district court that the duplicative litigation and forum shopping factors were both neutral.<sup>268</sup> In addressing the factor related to state law issues, the Ninth Circuit admitted that there was no great need for state court resolution in this case.<sup>269</sup> Essentially, the Ninth Circuit believed that all of the three *Brillhart* factors were neutral; however, the Ninth Circuit concluded in *Huth* that unless there was a presumption in favor of retaining jurisdiction, the district court could exercise its discretion to decline jurisdiction.<sup>270</sup>

It is clear that the factors set forth in *Brillhart* are not exhaustive. Even though the Ninth Circuit in *Huth* recognized this principle, it apparently did not see the need in finding any other factor which would weigh in favor of abstaining from exercising jurisdiction. The effect of this reasoning is that, as long as the district court analyzes the factors of *Brillhart*, the district court can abstain even where the factors weighed are neutral. Such a decision would leave the courts without any guidance on the discretion in abstaining from exercising their jurisdiction in these types of cases, abrogating the effect of the Supreme Court's decisions in *Brillhart* and *Wilton*. Currently, the federal courts are left divided and without coherent standards for exercising their discretion under the FDJA and reviewing courts will have no standard by which to review the district courts for abuse of discretion.

This standard, or lack thereof, directly contradicts the "spirit of the law" as set forth by the Ninth Circuit in *Government Employees Insurance Company v. Dizol*.<sup>271</sup> The Ninth Circuit has held that examination of the district court must create a "sufficient record of its reasoning to enable appropriate appellate review."<sup>272</sup> Without such a record, the appellate courts would not be able to provide the district courts with "appropriate guidance."<sup>273</sup> The Ninth Circuit in *Huth*, while effectively finding that all the factors analyzed by the court were neutral, found this a sufficient recording of the district court's

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267. See *Government Employees Ins. Co. v. Dizol*, 133 F.3d at 1225; *Continental Cas. Co. v. Robsac Ind.*, 947 F.2d 1367, 1371-73 (9th Cir. 1991).

268. *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800, 803-04 (9th Cir. 2002).

269. *Id.* at 804.

270. *Id.*

271. 133 F.3d 1220 (9th Cir. 1998).

272. *Id.* at 1225.

273. *Id.* (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995)).

analysis.<sup>274</sup> Where analysis of the factors reaches a neutral result, and that is all that exists in the record, the actual reasoning of the court is not recorded at all. Without such a record, the court's reasoning may be based on "whim or personal disinclination."<sup>275</sup> It is for this reason that the Supreme Court has recognized that the district court's decision to abstain from jurisdiction cannot rest on a mechanical checklist of factors, but must rest "on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighed in favor of the exercise of jurisdiction."<sup>276</sup>

Under the Ninth Circuit's analysis in *Huth*, therefore, where the *Brillhart* factors are totally neutral, the district court may then use its unfettered, unguided discretion to deprive a party of the federal forum it has selected based on the whim of the District Court judge. Both the Supreme Court and the Ninth Circuit have confirmed that such discretion is unacceptable.<sup>277</sup> The *Huth* decision exalts form over substance, merely paying lip service to the Supreme Court's requirements that the discretion of the District Court be guided by some standard, broad though it may be.

#### D. Taking Another Look at the Application of the Ninth Circuit Brillhart Factors in the Factual Circumstances of *Huth*

##### 1. "Forum Shopping"

The application of the *Brillhart* factors in *Huth* also reveals the direction that the reasoning of this decision will take the federal courts. Initially it can be observed that in *Huth*, the Ninth Circuit's holding in relation to the "forum shopping" factor is in contradiction to the previously established law in the Ninth Circuit, other federal jurisdictions, and the United States Supreme Court.<sup>278</sup> *Huth* claimed under *Wilton* that it was of no significance which case (the state case

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274. *Huth*, 298 F.3d at 803 (stating that "[i]n its Order, the district court stated its reasoning under each *Brillhart* factor in satisfaction of the requirement that the court make a record of its reasoning sufficient to allow review.").

275. *Dizol*, 133 F.3d at 1223 (quoting *Public Affairs Associates. v. Rickover*, 369 U.S. 111, 112 (1962)).

276. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15-16 (1983). Stated differently, a district court's task "is not to find some substantial reason for the exercise of federal jurisdiction." *Id.* at 25.

277. See *Huth*, 298 F.3d at 803; *Dizol*, 133 F.3d at 1223 (quoting *Public Affairs Associates. v. Rickover*, 369 U.S. 111, 112 (1962)).

278. See *United Nat'l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001); *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361 (9th Cir. 1991); *Allstate Ins. Co. v. Shelton*, 105 F.3d 514, 515-516 (9th Cir. 1997); *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998).

or the federal case) was filed first and perhaps under facts similar to those found in *Wilton* that may have been true.<sup>279</sup> However, applying that rule to the facts in *Huth* would only support the parties' ability to engage in forum shopping.

First, Hartford did not engage in "forum shopping" as contemplated in *Brillhart* by removing the Arizona declaratory action to federal court. Forum shopping is generally defined as occurring "when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict."<sup>280</sup> This occurs every time a suit is filed;<sup>281</sup> however, this is not the "forum shopping" addressed in the *Brillhart* factors.<sup>282</sup> The forum shopping contemplated under *Brillhart* is the avoidance of abusive, "reactive" declaratory judgment actions.<sup>283</sup> In *Chamberlain v. Allstate Insurance Company*,<sup>284</sup> the Ninth Circuit stated that the forum shopping factor of *Brillhart* was based upon the "concern that parties

279. See *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

280. BLACK'S LAW DICTIONARY 655 (6th ed. 1990). See also Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 80 (1999) (stating that "attorneys filing lawsuits or defending against lawsuits usually have the same objective when it comes to evaluating or seeking a venue—they seek a venue in which their clients can not only get a fair trial, but in which their clients might gain some advantage or begin with the odds in their favor.").

281. See *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 391 (5th Cir. 2003) (stating that "[t]he filing of every lawsuit requires forum selection."). See also Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (observing that "[f]orum selection is always a part of the legal process; at no clear point does it become forum 'shopping.'").

282. See *Chamberlain*, 931 F.2d at 1367 (observing that the *Brillhart* decision expressed a "concern that parties could attempt to avoid state court proceedings by filing declaratory relief actions in federal court. This kind of forum shopping could be avoided by requiring district courts to inquire into the availability of state court proceedings to resolve all issues without federal intervention.").

283. See *id.* In *Sherwin-Williams*, the Fifth Circuit Court of Appeals discusses this issue at length, stating:

Although many federal courts use terms such as "forum selection" and "anticipatory filing" to describe reasons for dismissing a federal declaratory judgment action in favor of related state court litigation, these terms are shorthand for more complex inquiries. The filing of every lawsuit requires forum selection. Federal declaratory judgment suits are routinely filed in anticipation of other litigation. The courts use pejorative terms such as "forum shopping" or "procedural fencing" to identify a narrower category of federal declaratory judgment lawsuits filed for reasons found improper and abusive, other than selecting a forum or anticipating related litigation. Merely filing a declaratory judgment action in a federal court with jurisdiction to hear it, in anticipation of state court litigation, is not in itself improper anticipatory litigation or otherwise abusive "forum shopping."

343 F.3d at 391.

*Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (stating that in relation to the *Brillhart* factors, "federal courts should generally decline to entertain reactive declaratory actions.").

284. 931 F.2d at 1367.

could attempt to avoid state court proceedings by filing declaratory relief action in federal court."<sup>285</sup> Hartford's action in federal court was filed prior to the Huth state action and therefore could not have been filed to avoid an impending adverse ruling in state court.<sup>286</sup> Further, removal of the state action to federal court based on diversity jurisdiction is not forum shopping as contemplated by *Brillhart*.<sup>287</sup> According to this case law in the *Huth* case, Hartford cannot be said to have engaged in forum shopping by initially filing an action in federal court and then removing the state action to federal court.

Second, the still valid case law of the Ninth Circuit indicates that Huth did engage in "forum shopping" as contemplated in *Brillhart* by filing the Arizona declaratory judgment action. The Ninth Circuit later expanded the statement made in *Chamberlain* to encompass a reverse scenario.<sup>288</sup> The Ninth Circuit declared in relation to an insured filing a state action in an attempt to avoid federal jurisdiction:

As we have explained, district courts "should discourage litigants from filing declaratory judgment actions as a means of forum shopping." . . . While the circumstances here are perhaps different than those anticipated when those words were first written, we nonetheless find the principle to be a sound one as applied in this context. Forum shopping through the filing of declaratory judgment actions is no more appropriate when it favors state over federal jurisdiction than when it favors the reverse.<sup>289</sup>

The implications of this ruling are that if it is forum shopping for an insurer to file a reactive declaratory judgment action in federal court when there is a pending state court action, it is also forum shopping when an insured files a reactive declaratory judgment action in state court declaratory judgment action when there is a pending federal counterclaim.

Thus, according to the established law in the Ninth Circuit, Hartford's act of filing a proper case in federal court, when no state action was pending, and when no non-removable state law claims appear to have been anticipated, could not be said to be forum

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285. *Id.*

286. See *Allstate Ins. Co. v. Shelton*, 105 F.3d 514, 515-516 (9th Cir. 1997) (holding that the District Court did not abuse its discretion by retaining jurisdiction when there was no parallel proceeding in state court when the Federal Declaratory Judgment action was commenced); *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998) (holding that carrier did not engage in forum shopping by filing its declaratory judgment action in Federal court before the insured filed its action in state court).

287. See 28 U.S.C. § 1441(a) (1982).

288. See *United Nat'l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102 (9th Cir. 2001).

289. *Id.* at 1114-15.

shopping.<sup>290</sup> However, according to the Ninth Circuit's holding in *R&D Latex*, Huth's filing of a reactive, identical declaratory claim in state court is forum shopping.<sup>291</sup> Therefore, the Ninth Circuit in affirming the finding that the forum shopping factor did not weigh in favor of either party would leave a district court without guidance to appropriately apply this factor, essentially allowing the courts the unfettered discretion to use it in whatever way that allows for abstention.

## 2. "Duplicative Litigation"

Again, the Ninth Circuit decision in *Huth* made the application of this factor as broad as possible. The *Huth* court held that this factor was neutral because "[t]he case will be disposed of entirely either in state or federal court, depending upon the outcome of this appeal."<sup>292</sup> This does not accurately represent the nature or basis of this factor. The basis for this factor, as previously articulated by the Ninth Circuit, is that the *Brillhart* "court no doubt wanted to avoid duplicitous litigation. As the [*Brillhart*] court noted, '[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.'"<sup>293</sup>

Essentially, this *Brillhart* factor focused on federal interference with ongoing state litigation.<sup>294</sup> If that principle were applied to the facts as they existed in the *Huth* case, it is clear that there was no opportunity for interference with ongoing state court proceedings<sup>295</sup> because the state court action had been removed to federal court.<sup>296</sup> Because there was no opportunity for "duplicative litigation" by retaining jurisdiction over the case, it should have weighed in favor of exercising jurisdiction. Therefore, the reasoning used by the *Huth* court has the effect of broadening *Brillhart* abstention by turning the "duplicative litigation" factor into simply a concern of whether the case can be fully resolved in the state forum.

## 3. "Needless Determination of State Law"

Finally, the Ninth Circuit panel's decision, with regard to the holding on the "needless determination of state law" factor, also broadens the application of *Brillhart* abstention as it was contradictory

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290. *See id.*

291. *See id.*

292. *Huth*, 298 F.3d at 803–04.

293. *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir. 1991).

294. *See id.*

295. *See supra* Part III.A.2. and accompanying notes.

296. *Huth*, 298 F.3d at 802.

to the established law in the Ninth Circuit and in the United States Supreme Court.<sup>297</sup> The Ninth Circuit in *Huth* observed that there was no great need for a determination to be made in state court.<sup>298</sup> However, because there was no presumption favoring retaining jurisdiction, the Ninth Circuit affirmed the district court's decision that was based on the fact that it was solely a state law issue.<sup>299</sup> This is not, nor has it ever been, the proper standard for application of this factor.<sup>300</sup> The Supreme Court and the Ninth Circuit itself have always required more to weigh in favor of abstention.<sup>301</sup>

According to *Brillhart* and the Ninth Circuit's decision in *Chamberlain*, this factor supports abstention only where there is a pending state proceeding and the state law issues are complex.<sup>302</sup> The Ninth Circuit in *Chamberlain* stated the following as the basis for this factor:

The Court [in *Brillhart*] recognized the difficulty federal district courts would have in ruling on complex state law issues when it warned that "scattered opinions of an intermediate appellate court of a State may convey only doubts and confusion to one inexperienced in the law of that State and yet be entirely clear and consistent when placed in the mosaic of the whole law of that State."<sup>303</sup>

The legal issues in the *Huth* case were not complex, and did not require the district court to "find [their] way through a maze of local statutes and decisions on so technical and specialized a subject . . ."<sup>304</sup> Instead, as the panel recognized, there was no great need for a determination of the state law in the case.<sup>305</sup>

Further, as has previously been discussed, there was no pending state proceeding in *Huth*.<sup>306</sup> The language of the decision of the Ninth Circuit accepts the possibility that Hartford was correct in its assertion

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297. See *Brillhart*, 316 U.S. at 497; *Chamberlain*, 931 F.2d at 1367.

298. *Huth*, 298 F.3d at 804.

299. *Id.*

300. See *Brillhart*, 316 U.S. at 497; *Chamberlain*, 931 F.2d at 1367. See also Shapiro, *supra* note 2, at 587 (observing that "a wholesale refusal by the federal courts to adjudicate diversity cases on the grounds that these courts have more important things to do, and that the state courts are more appropriate tribunals, simply cannot be reconciled with the congressional grant of authority, no matter how much appeal this approach may have for particular judges.").

301. See *Brillhart*, 316 U.S. at 497; *Chamberlain*, 931 F.2d at 1367.

302. See *Brillhart*, 316 U.S. at 497; *Chamberlain*, 931 F.2d at 1367.

303. *Chamberlain*, 931 F.2d at 1367 (citing *Brillhart*, 316 U.S. at 497).

304. *Brillhart*, 316 U.S. at 497.

305. *Huth*, 298 F.3d at 804. See *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998) (when standard state law issues are in question, a Federal court can "just as efficiently decide" the matter as a state court can).

306. See *supra* Part III.B.

that there was no pending state court action because it had been removed.<sup>307</sup> While the Ninth Circuit stated that this fact does not preclude a district court from declining jurisdiction, it should have had the affect of nullifying this factor of *Brillhart* in the *Huth* case.<sup>308</sup> Even if the existence of a pending state action were only a factor in the balancing test, genuine application of this factor would reveal that where there is no state action in which the state law issue can be resolved, it cannot logically be asserted that a determination by the District Court is "needless." Accordingly, of those courts that agree that the non-existence of a pending state action is simply one factor of the district court's discretionary analysis under *Brillhart*, all have held that this factor weighs in favor of retaining jurisdiction over the federal action.<sup>309</sup>

Further, as more fully discussed above, the original state action in *Huth* should not have been remanded to state court under the abstention doctrine.<sup>310</sup> A proper understanding of the law on that issue requires the conclusion that the district court erred. Because the district court was bound to rule on exactly the same state law issues in the state based portion of the action, the district court could not say that the determination of state law was "needless."<sup>311</sup>

The affect of the decision by the panel in *Huth* creates a de facto presumption of declining jurisdiction in concurrent jurisdiction actions. Applying the standard that, as a general rule, the mere existence of a state law issue favors abstention, federal courts will be divested of jurisdiction in most concurrent jurisdiction actions because cases in federal court by way of diversity of citizenship most often rest on the application of state law.<sup>312</sup> Instead, the true standard for this

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307. *Huth*, 298 F.3d at 802-03.

308. *See id.*

309. *See Aetna Cas. & Surety Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 423 (4th Cir. 1998) (stating that "[c]learly, the existence of such a proceeding should be a significant factor in the district court's determination."). *See also Wells' Dairy, Inc. v. Estate of Richardson*, 89 F. Supp. 2d 1042, 1058 (N.D. Iowa 2000) (observing that "abstention is disfavored in cases where the state court action is not truly parallel or where there issues of federal law control."); *Epling v. Golden Eagle/Satellite Archery, Inc.*, 17 F. Supp. 2d 207, 210 (W.D.N.Y. 1998) (stating that "abstention is disfavored in cases where the state court action is not truly parallel or where issues of federal law control."); *Malbrough v. State Farm Fire & Cas. Co.*, 1996 WL 517702, 1\* (E.D. La. 1996) (observing that "[a] district court's interest in maintaining a declaratory judgment action grows in cases involving federal law or cases in which there are no parallel state proceedings.").

310. *See supra* Part III.A.1.

311. *See id.*

312. *See Torre v. Brickey*, 278 F.3d 917, 919 (9th Cir. 2002) (stating that state law applies in diversity actions); *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1527 (10th Cir. 1995) (holding that where jurisdiction is based upon diversity, the law of the forum state applies); *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361, 364 (3d Cir. 1974);

factor must be whether the action involves determination of a unique state law, rather than whether the action simply involves the straight application of a state law.<sup>313</sup> Under a unique state law standard, the lack of a complex issue of a state law thus weighs in favor of retaining federal jurisdiction.<sup>314</sup> The Ninth Circuit's reasoning in *Huth*, however, would significantly expand the ability of the district court to apply *Brillhart* abstention in contravention to both the decisions by the Supreme Court and other decisions in the Ninth Circuit on this issue.<sup>315</sup>

#### IV. CONCLUSION

The federal courts have continued to promulgate comity and federalism as the basis for the exercise of abstention, and the *Huth* decision is no different. However, in purporting to maintain a safe and proper balance between state and federal sovereignty, the Ninth Circuit has taken a useful tool out of the hands of litigants. Under *Huth*, the creation of the right of action pursuant to the Federal Declaratory Judgment Act has been rendered meaningless, and the long-standing right to remove a state action to federal court, at least in the declaratory judgment context, becomes a hollow and irrelevant device.

The ultimate result in the Ninth Circuit, and potentially in all federal jurisdictions, is that federal judges have no restraint on the exercise of their discretion. Rather than having to perform a balancing test, as set forth by the Supreme Court in *Brillhart*, district courts must only perform a cursory examination of a predetermined checklist. As long as the court goes through the motion of at least looking at the factors, they are never faced with the compulsion of accepting jurisdiction over a declaratory judgment action, regardless of whether there is a pending state court action.

The development of federal case law reveals that, over time, the federal judiciary has been unilaterally narrowing the boundaries of the jurisdiction granted to them by Congress. The *Huth* decision in the Ninth Circuit is simply the next giant step in this process. With this implosion of federal jurisdiction in the Ninth Circuit, we may be seeing the beginning of a "domino effect" across the country. The consequence is that rather than being subject to the requirement of

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Carson v. Nat'l Bank of Commerce Trust and Savings, 501 F.2d 1082, 1083 (8th Cir. 1974); Strachan v. Nisbet, 202 F.2d 216, 218 (7th Cir. 1953).

313. See *Brillhart*, 316 U.S. at 497; *Chamberlain*, 931 F.2d at 1367.

314. See *Brillhart*, 316 U.S. at 497; *Chamberlain*, 931 F.2d at 1367.

315. See *Brillhart*, 316 U.S. at 497; *Chamberlain*, 931 F.2d at 1367.



exercising their “virtually unflagging obligation” to accept jurisdiction, the federal courts have been given license to exercise their “virtually unflagging opportunity” to avoid it.